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ROYAL COMMISSION ON TRANSPORTATION

OTTAWA, ONTARIO
FRIDAY,
MAY 19, 1950.

THE HONOURABLE W.F.A. TURGEON, K.C., LL.D.	-	CHAIRMAN
HAROLD ADAMS INNIS	-	COMMISSIONER
HENRY FORBES ANGUS	-	COMMISSIONER

G.R. Hunter
Secretary

COUNSEL APPEARING:-

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G.C. Desmarais, K.C.		Transportation
F.C.S. Evans, K.C.	}	Canadian Pacific Railway
K.D.M. Spence		
I.D. Sinclair		
H.E. O'Donnell, K.C.	}	Canadian National Railways
H.C. Friel, K.C.		
J.J. Frawley, K.C.)	Province of Alberta
M.A. MacPherson, K.C.)	Province of Saskatchewan
C.W. Brazier,)	Province of British Columbia

Ottawa, Ontario,

Friday, May 19, 1950

MORNING SESSION

ARGUMENT BY MR. EVANS (Cont'd)

MR. EVANS: Before I resume the subject of economic, geographic and other disadvantages, my lord, I want to have two minutes on the question of equalization. Your lordship asked Mr. Shepard whether he could provide material from which the Commission could be informed as to the condition today, as to the disparity between the East and West on the formula Mr. Moffat* calculated. I have had a request from Mr. Moffat for the information, but almost simultaneously our own Accounting Department produced the equivalent that we have shown in our brief on page 66, Part II; and the figure as of the end of February of this year, calculated on the same basis, and including grain -- you will remember that Mr. Moffat's* calculation excluded grain -- the so-called disparity is .75 of one per cent

that is three-quarters of one per cent. That compares with the figure as at the end of June last year of .003 of one per cent. I have prepared a summary of that, just bringing it down to date in the same way as it was brought down to date in Part II of the brief, which I ^{can} file as an exhibit. I have not a sufficient number of copies of it to supply everyone, but that would be Exhibit 287, if your lordship pleases.

THE CHAIRMAN: Very well.

MR. EVANS: I have also sent a copy to Mr. Moffat .

THE CHAIRMAN: It is not ready, is it?

MR. EVANS: I can give your lordships copies: but it will be reproduced.

THE CHAIRMAN: What is the number?

MR. EVANS: It is Exhibit 287.

EXHIBIT NO. 287: Filed by Mr. Evans:

Statement showing disparity
between east and west --
calculated on Mr. Moffat's
formula.

MR. EVANS: In putting that in as an exhibit, I do not want to take the responsibility of accepting the formula. We think the formula has great drawbacks and shortcomings, and the difficulties with it appear in the evidence before the Board of Transport Commissioners during my cross-examination of Mr. Moffatt.

The second point I wanted to mention in opening, which I left rather in the air yesterday, I think --

THE CHAIRMAN: Will you pardon me a moment, Mr. Evans. I see a reference here at one of the figures to Exhibit 326. Where is that?

MR. EVANS: That was Exhibit 326 in the 21% Case and was the original study done by Mr. Moffat.. It was on that exhibit that I cross-examined him, and I think exposed the frailties of his approach and his calculation.

MR. MacPHERSON: May I ask Mr. Evans this question. He says he has sent a copy to Mr. Moffat. In the unavoidable absence of Mr. Shepard who is detained for reasons that will be well known to the Commission --

THE CHAIRMAN: I beg your pardon?

MR. MacPHERSON: Mr. Shepard is not here, of course.

THE CHAIRMAN: No.

MR. MacPHERSON: He is very busily engaged in Winnipeg at the moment. I wonder if this information has just been sent to Mr. Moffat or has it been sent some days ago.

MR. EVANS: It was sent a day or so ago; and Mr. Moffatt had been asked by Mr. Shepard to get the information

from us. I will give my friend and Mr. Shepard copies of this when they are available.

Then the second thing which I think I had left in the air yesterday in dealing with the equalization was this. I made the assertion that ^{of} all of the amendments to Section 314, Mr. Brazier's amendment was by far the most sweeping. I am not going to deal with that in detail but I would ask the Commission to look at page 15 of the Consolidation, because I see that perhaps there may be some difficulty in interpreting the changes that appear there and the authorship of those changes. That is page 15, my lord.

THE CHAIRMAN: Yes?

MR. EVANS: You will see there that certain words are struck out by the diagonal strokes of the typewriter. Those represent the words --

THE CHAIRMAN: I beg your pardon. I notice that the amendments which you have on page 15 are credited to Alberta and to British Columbia.

MR. EVANS: That is the point that I think I should clear up before I pass on. The diagonal strokes represent the words "struck out by both Alberta and British Columbia".

MR. FRAWLEY: No. That has just been drawn to my attention. Only by British Columbia.

MR. EVANS: You did not strike out "the same line or route"?

MR. FRAWLEY: "Passing over the same line or route", no: we did not strike that out.

(Page 23233 follows)

MR. EVANS: That was rather confusing to me too.

THE CHAIRMAN: The first words struck out here are "under substantially similar circumstances and conditions".

MR. EVANS: Yes, that is common to Alberta and British Columbia as I am now informed.

THE CHAIRMAN: That is what I thought.

MR. EVANS: And then British Columbia strikes out in addition "passing over the same line or route" and then Alberta adds the underlined words. Now then, in the result - -

THE CHAIRMAN: Pardon me, I just want to make sure. Mr. Frawley, would Alberta retain those words "passing over the same line or route"?

MR. FRAWLEY: Yes, my lord. The amendments which I have taken the trouble to copy out again after the changes I made and subsequent to my argument, the first section of 314 now reads:-

"All tolls shall always in respect of all traffic of the same description and carried in or upon the like kind of cars or conveyances passing over the same line or route from the same origin to the same destination, be charged equally to all persons and at the same rate whether by weight, mileage or otherwise."

MR. EVANS: All I want to leave on the record on this point is that British Columbia having struck out the words "under substantially similar circumstances and conditions" and also the words "passing over the same line or route", has by that process proposed complete equality of rates everywhere in Canada, except only subject to

the limitation that they must be on like cars or conveyances. That was to clarify the statement I made yesterday.

Now, if I may turn to the subject of:-

ECONOMIC, GEOGRAPHIC AND OTHER DISADVANTAGES

I refer to P.C. 6033 - Section 2(a) which says:-

"(a) Review and report upon the effect, if any, of economic, geographic and other disadvantages under which certain sections of Canada find themselves in relation to the various transportation services therein, and recommend what measures should be initiated in order that the national transportation policy may best serve the general economic well-being of all Canada."

Much of the evidence and many of the representations made to you have concerned themselves with this subject. Indeed, it would not be too much to say that most of the representations of the Provincial Governments have in one form or another been based upon economic, geographic and other disadvantages.

The remedies proposed, apart from specific remedies dealt with under the other heads of the Order-in-Council embrace three general matters. These are:-

- (1) Subsidies;
- (2) Relief from horizontal increases;
- (3) The need for rates to establish an incentive or at least neutrality in the matter of location of secondary industry.

I shall deal with these in that order.

(1) Subsidies:-

Our position on the matter of subsidies is stated in the Brief and by Professor McDougall who was called as a witness. In addition, the position has been elaborated to some extent by counsel at various stages of the hearings.

It is argued that subsidies should be paid to relieve the areas affected by economic, geographic and other disadvantages. Some means they say should be found by which they should be relieved of the so-called "burden" of transportation charges from which they suffer in view of their distance from the market, or in view of their economic difficulties.

The sections of the Brief of Canadian Pacific dealing with these matters are as follows:-

pp. 36 to 48 inclusive of Part I.

pp. 161 to 170 " of Part II.

The pages in Part I deal generally with a comparison between the position of Canada and the United States and between various areas in Canada and adjacent areas in the United States. Professor McDougall's evidence on this subject extends from pages 17767-18006 of the Transcript. This evidence is particularly referable to Paragraph 34 on p. 36 of Part I of the Brief in connection with the assertion that the people of Canada are at a disadvantage in that the trade of Canada has been forced into East and West channels while the North and South movement would be the normal movement.

My submission is that this statement has been amply met by the material set forth in the Brief and by Mr. McDougall's evidence. I have nothing to add

except to say that nothing which has been put forward in evidence or in argument has disturbed the essential soundness of the contentions made by Canadian Pacific on that subject. It is, I think, clear that in the very nature of things and quite apart from international boundaries, the movements of trade in Canada must have been at least as lengthy and must have, generally speaking, followed the same directions as they now do. The matter of subsidies is one which, although there is not completely unanimous opinion among the Provincial Governments appearing before your Commission, looms very large indeed in the submissions which they have made.

Alberta did not ask for subsidies in its brief or through its witnesses, but Mr. Frawley, in his argument at p. 21826 has joined the ranks of the subsidy seekers. Moreover, as I shall show in dealing with horizontal increases and long-and-short-haul discrimination, there is, to some extent, an indirect subsidy involved in their contentions. Professor Stewart, who gave evidence in Edmonton as well as in Ottawa, stated at p. 2022 that it would be rather inappropriate for him to take a general stand against subsidies although he would not like to see them too widely applied. On p. 2023 he would not agree that the use of subsidies tended to produce an uneconomic use of transportation facilities although he was ready to admit that it is possible that "public attitude to the use of subsidies might become such that the principle was applied in cases where it should not be. There is danger in that." I pause to suggest that if the six Provincial Governments who now favour transportation subsidies can be said to represent the "public attitude"

we have reached the danger point of which Professor Stewart speaks.

Mr. Moffat, appearing for Manitoba, at p.8987 of the Transcript, went a step further than Dr. Stewart. He very definitely indicates that Manitoba is quite prepared to adopt the principle of subsidies although it adheres to the position that none are necessary at the present time to enable the privately-owned Canadian Pacific to operate successfully.

At p. 8910 it is clear, in his opinion, that the question as to whether in a given case a subsidy would be necessary, would depend upon public opinion as to the level of freight rates.

As he put it at the bottom of that page, public opinion has to take its choice either of (and I am using his language) "letting go on a rate increase or letting go on a subsidy." At p. 8911 he says:-

".....the recommendation which we thought your Commission should make should be so framed that it would not eliminate the possibility of the Government granting a subsidy at some time but not a recommendation for a subsidy."

The Brief of Saskatchewan contains an out and out request for a very substantial subsidy based on the example of the Maritime Freight Rates Act which is a pure transportation subsidy.

The Maritime Provinces and the Transportation Commission of the Maritime Board of Trade which already have the benefit under the Maritime Freight Rates Act of a substantial transportation subsidy, are clearly anxious to have that subsidy increased.

We thus have four different viewpoints on

the matter which differ only in degree. Alberta, which can, in view of the recent discoveries of oil, be classed as one of the more prosperous provinces, is not prepared to rule out the principle of subsidy. Manitoba frankly prefers the subsidy principle to an increase in freight rates. Saskatchewan frankly requests a subsidy and the Maritime Provinces ask for the extension of their present subsidy.

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There is a great deal of significance in these different viewpoints and they indicate in my submission, the evil tendencies present in the idea of subsidies. My submission is, and I will elaborate somewhat on the point, that the idea of subsidy, once it has germinated, is something which grows inevitably from the acceptance of the idea to a request for subsidies and to the desire to extend them. Indeed, as it is argued in the Brief, this is one of the principal objections to subsidies, and I shall draw attention to that matter at a later stage.

The subsidies with which we are concerned as they relate to transportation can be broadly divided into three kinds.

First, direct payments to an industry because of the so-called burden of transportation charges which its economic and geographic position imposes upon it. As our submission makes clear, this is the only form in which subsidies, if they must be paid, should be paid. There is no doubt about our position in this matter. Subsidies are bad in any form but Canadian Pacific does not take the position that circumstances of an unusual kind may not in some cases require that subsidies be paid. If they are to be paid, however, they should be directly paid to the industry involved and not indirectly as some of the suggestions propose.

THE CHAIRMAN: What are examples of present subsidies of that kind?

MR EVANS: Feed grain assistance, I think, paid to the farmer using it.

THE CHAIRMAN: Is there anything else in Canada?

MR EVANS: There are a lot of other subsidies, of course, that are paid.

THE CHAIRMAN: I mean connected with transporta-

tion.

MR EVANS: I know of none at the moment.

COMMISSIONER INNIS: You would not regard the deficits of the Canadian National as a subsidy?

MR EVANS: That is a different kind. I have three kinds.

COMMISSIONER INNIS: That is included in---

MR EVANS: Yes. I have a very special section on that. What I have mentioned now are direct payments to an industry, which I say is the only form which a subsidy should take if we must have them.

Second, transportation subsidies, which may for the purpose of my argument be treated as typified by the subsidy under the Maritime Freight Rates Act. This subsidy involves a direct relationship between the charges for transportation and the amount of the subsidy. Such subsidies are perhaps more correctly described as indirect subsidies inasmuch as the payments are not made directly to individuals but are made to the transportation companies in relation to the transportation service performed.

Canadian Pacific is strongly opposed to any subsidy in this form or to any extension of an existing subsidy of this kind. It recognizes, however, that because industries have grown up under the protection of this subsidy since it was first established under the Maritime Freight Rates Act, it would cause dislocation if it were removed. Canadian Pacific, however, takes the position that this form of subsidy should not be applied in other parts of Canada and, above all, should not be extended and increased as is proposed by the Maritimes. In fact, the position of the Maritimes illustrates the view of Canadian Pacific as to

the evils and dangers of such subsidies. The Maritimes, dissatisfied with the benefits they now have, ask that they be extended. Moreover, Saskatchewan, which desires a subsidy, is now in competition with the Maritimes to obtain a similar subsidy.

A further extension of this principle is involved in the suggestions of the Canadian Manufacturers' Association and the Industrial Traffic League by which the principle of the Maritime Freight Rates Act is to be applied to any upward revision in the Crow's Nest Pass grain rates which may prove necessary.

The third form of subsidy is a much more insidious form. It takes place in various ways which tend to obscure from those who pay them, the extent to which they are in fact being paid. This, unquestionably, is the most serious and insidious form in which a subsidy can be paid. Examples of this kind of subsidy are those hidden subsidies which will result from the deficit operation of railway companies and, even more insidiously, the form of subsidy which is represented by the contentions of the provinces against flat percentage increases. I do not propose at the moment to deal with the question of horizontal percentage increases, because I am dealing with that at a later stage, but I point out that if horizontal percentage increases are objectionable with regard to long hauls, the theory of applying maxima or the other alternatives to all long hauls presupposes that the cost of operation for the mileage between the point at which the maximum operates and the point of destination does not increase as do other costs. If, in fact, they increase as do other costs, the application of such forms of increase tends to put higher rates on short hauls and to excuse the longer haul from paying its

full proportion of the cost of transportation. This then is a form of subsidy of the most insidious kind. As the Drayton-Ackworth Commission said at p. 72 (p.20612 of the transcript), such subsidies are "wrong in principle".

Now, I do not want it to be inferred from that that the Drayton-Ackworth Commission was talking about a horizontal percentage increase; it was talking about the kind of subsidy that I am speaking about.

There was some tendency on the part of provincial counsel during Mr. McDougall's evidence in chief to treat as absurd the suggestions in the Canadian Pacific Brief and in Mr. McDougall's evidence with regard to the example he gave of free transportation. I should perhaps make clear the purpose of this example.

Quite obviously, free transportation would be an answer to all economic and geographic disadvantages of the various areas in Canada. The value of using such an example is that the only way that one could remove all these disadvantages would be to provide free transportation. By free transportation I mean that no charge is made for the transportation service as such, but that the total cost of transportation is paid by the taxpayer. Of course, this really is not free transportation, but it is free transportation in the sense that illustrates the position we take.

Now then, if free transportation is wrong in principle in that it involves a 100% subsidy by the taxpayer, it follows that the principle of subsidy is wrong and that the extent of the wrong is only a matter of degree. One I submit, can quite properly use the extreme case in order to prove the evil attendant upon the acceptance of the principle. A matter is not less wrong in principle, although it may be less

wrong in degree, merely because one does not go the whole way in establishing the principle.

There is, however, a further point of importance in support of the use of such an example. It is that if one accepts the principle of subsidies one finds an insatiable appetite for subsidies on the part of those who already receive them as well as an increasing demand from others who do not receive them to be placed on an equal footing with those who do. At some stage of this controversy which will develop, one must put a stop to the tendency. My suggestion is that it is far harder to put a stop to a tendency once the principle is accepted than it is to reject the subsidy as a matter of principle in the first instance. We therefore submit that the position taken with regard to the extreme case is a useful basis upon which to examine the principle as distinct from the degree to which the various parties would apply that principle.

If, in principle, the ultimate application of it results in economic waste and this can unquestionably be shown by the use of the example of the extreme case, it follows that the application of the principle in part will also result in economic waste differing only in degree.

The economic waste is that if transportation is subsidized, that is to say, if the persons using the transportation service do not pay the full cost of the transportation, then the inevitable consequence is that there will be an undue proportion of the total output of labour and materials devoted to transportation services. This is because the demand for transportation will increase as the more distant shipper sees advantage in getting into the most distant market in competition

with those more favourably situated to that market. Thus the direct and total cost of transportation, pyramids as more and more labour and materials are devoted to it. The limit upon the use of transportation will be reached only when the labour and materials devoted to transportation reach the saturation point and traffic decreases. At that point we will find a very large proportion indeed of the national effort devoted to that purpose.

(Page 23245 follows)

I now turn to Part II of the brief. I do not intend to read this section because of the pressure of time. I ask the Commission to bear in mind in particular the beginning of the third paragraph on page 162 of Part II down to and including the incomplete paragraph at page 163½.

COMMISSIONER INNIS: Will that be taken into the record?

MR. EVANS: If you think it is desirable.

COMMISSIONER INNIS: Yes.

MR. EVANS: "Subsidies are not a remedy for existing discontents which a few suggest haltingly, and with diffidence; they seem to be looked on as a sovereign and universal remedy to be applied in any necessary degree, and without limit as to time. It is true that some of their proponents showed themselves aware that there are objections to the use of subsidies: but, with or without that preliminary bow to the canons of financial orthodoxy, they all, with one accord, accept the subsidies already in existence and look to see what more can be got. It therefore seems desirable to examine subsidies as a fiscal device and to make some estimation, however rough, of the effect which a radical extension in their number and in the amounts given under them would have.

"For present purposes, a subsidy may be defined as a payment made out of general taxation by a taxing authority in respect of the production, distribution or consumption of goods, services, and other economic advantages when it would be possible to allocate the actual costs to those who enjoy the goods, services, and advantages in direct proportion to such enjoyment. Under that definition, the free use of a sidewalk is

not a subsidy because it is not possible to charge the passer-by directly for its use. The nearest approach that can be made to charging for what is received is to assess the property owner for the cost and that is normally done. Water may be furnished on a flat charge basis so long as use is relatively equal, on the ground that it is expensive to furnish a metered service; but it is noteworthy that as soon as air conditioning systems make that hypothesis less tenable, meters are again put forward as the alternative to a very costly increase in the water pumping and supply system. A subsidy differs from these border-line cases in being a conscious attempt to develop a different economic pattern than would be expected to work itself out. Taxation is levied to raise funds, and monies are paid out directly or indirectly to those who would otherwise have been expected to pay for what they receive."

The Brief then goes on to point out the various motives which result in the payment of subsidies and the nature of the subsidies now paid in Canada whether for transportation or other matters.

"While this list may not be completely inclusive, it covers the major part of the subsidies now given. It is also fairly obvious that unless there are reductions in this list this country will have gone very far toward a denial that the price system is either an effective instrument for the distribution of the national product or that material rewards are a necessary incentive to continuity of effort in any one narrow function inside a whole society. If there is a radical extension of that list it can

only come as an acceptance of the view that this country ought to move toward a socialistic system. Here is a primary decision in social policy which must be faced directly and at the highest levels. It cannot be settled by the continuous addition of one subsidy to another - especially when the purpose of many of the subsidies presently proposed is to neutralise those already given.

"The initial effect of any subsidy is to give to some group what it could not otherwise have at all, or have so easily, and to assess the cost of that gift against others. It is therefore immediately beneficial to those who receive it, whereas the costs tend to get spread over a large number. In the long run, the result is to retard the redistribution of population and of economic effort in response to current conditions. Its long-run effect must therefore be to bring about a cumulative reduction in the productivity of the country. This is the major ground for opposing the granting of subsidies; but there are also a number of other considerations which in their sum are alone sufficient to deny their value as an instrument of social policy.

"First of all, it is impossible to calculate the net subsidy received by any one interest if more than one subsidy is given. A single subsidy is not subject to any deduction. When a second subsidy is added, it is paid in part out of taxes levied on the receivers of the first. The more subsidies are given, the less is the net value of any one of them to their nominal receivers. In the end one comes

to a situation in which the effort necessary to protect and, if possible, to increase one's own subsidy plus the additional taxation necessary to pay all subsidies, over-balances any net gain received and one is left with a situation in which all would gain from a wiping of the slate.

"Secondly, the existence of any one subsidy is a powerful argument for the granting of subsidies to others. It may be simply because the defence against such grants has been breached, so that anyone with a claim feels that he has a fair chance to press it successfully. It may be that the existence of a subsidy to one interest creates a competitive inequality so that some other interest asks for a subsidy also to restore the old position.

"Thirdly, attempts to redistribute income on this scale inevitably involve a growing burden of taxation. The net benefits from subsidies defy measurement because it is not possible to say what the society would have been like if it had been allowed to develop without them. The one certainty in the situation is that those who are engaged in the collection of taxation have to be supported out of its proceeds and are not available for the production of other values in the commercial and industrial system. The very weight of this taxation and the difficulty of satisfying the rules and regulations of the various taxing authorities provide one more hurdle for the small enterprise to clear, and slows down the creation of small businesses which, in the aggregate, contribute heavily to the total volume of employment.

"Perhaps the most serious aspect of subsidies (and the taxation to support them) to a country like

Canada which depends so heavily on international trade is the fact that they are, in the long run, inconsistent with the permanent interests of the country. At some stage in their development a choice must be made between permitting the full development of such trade and limiting it in order to produce those internal transfers of income to which the government has committed itself over the years. International trade is not consistent with drawing the economic life of the country under the control of its central government. It is possible to argue that the process has already gone too far and should, in justice to those who depend on export production, be reversed; but it is not possible to argue that

countervailing subsidies should be paid to export producers. At some stage in the building of such a complicated administrative structure of taxation and subsidies, international trade will find the administrative hurdles too high to surmount.

"What has been said above is not a denial that any subsidy is ever justified, nor is it an attempt to deny the stresses which are set up in a society relying upon prices for its balance and control when substantial changes are in process. It is the much more limited statement that subsidies are, by their very nature, so dangerous that they must be treated with the greatest circumspection. The problem is not how to find some worthy recipient of them, it is how to keep from developing a whole chain of subsidies which grow in number and in size until they become unmanageable.

"When some large area is faced with a sudden and deep readjustment which is too great to accomplish

in the time available without grave social dislocation, a subsidy is desirable to cushion the shock which is otherwise inevitable. For example, the decline in income in the Prairie Provinces between 1929 and 1932 was based on two factors, the decline in yields and the decline in price. Either one might have been supported with difficulty had it been experienced alone. Together they were overwhelming. It was proper under such a situation to attempt to break the shock and to bring about a more orderly readjustment than would otherwise have been possible.

"When subsidies are ^{so} ~~caused~~, there should be a direct grant given solely on proof of individual need, and to be in regularly decreasing amounts with a time limit on its life. This does not mean that there may not be occasions when subsidies should be reviewed, and, if need be, extended in the light of new conditions. It only means that no subsidy should be set up without a time limit so that the receivers of it do not develop a vested interest in it. It should also be clear who pays and who receives; and that the receiver is not to lean permanently on the public purse.

"When a subsidy has to be given, the fact should be faced honestly and the subsidy given directly. When, for example, there is agricultural distress, the response to it is a subsidy paid to those agriculturists who are in need. When the attempt is made to give it indirectly by compelling a reduction in one of the elements of agricultural production cost, as for example, the Crow's Nest Rates on grain, then not only is the subsidy shared by many who are not in need, but the impact on other shippers is very much

greater than if the necessary subsidy had been paid directly from the public purse and its burden spread over the whole economy.

"The opinion of the Board of Investigation and Research upon this point is submitted as pertinent:

'The indictment of transportation subsidies is a strong one, to be disregarded only where there are clearly overriding public objectives which could not otherwise be attained. In this connection, it is well to guard against the inclination to magnify the benefits associated with transportation aids, for the obverse of these benefits is the costs which are necessary to obtain them. Public policy should aim to foster the relative development of each available kind of transportation, according to its capacities for contributing economically and effectively to the transportation system -- all costs considered. In seeking this end, it is important to avoid the tendency, where public expenditures are involved, to exalt the benefits and forget the costs, which are no less real when they are borne by others than those who use the transportation facilities.

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'A sound and adequate domestic transportation system is most likely to result if the users of each means of transportation pay the costs which are fairly attributable to their use. Maldevelopment and waste are almost certain to accompany the provision of transportation facilities from public funds at taxpayers' expense, for

then the surest guide to sound expenditure is denied -- the calculated judgment of transportation users who indicate their preference by an effective economic demand. Not only is there the possibility that transportation facilities will be overdeveloped in the aggregate; it is more likely that the different types will not be properly developed relative to each other -- with the result in either case that the over-all costs of transportation (public and private) are increased.

'The sound general principle, therefore, is to withhold subsidies to domestic transportation rather than to grant them. Subsidies are at their best when they are extended temporarily to cope with emergency conditions, or to give an initial impetus to a new form or facility of transportation which holds promise of becoming an essential part of a sound and adequate system. On the other hand, financial aids are likely to be at their worst when they must be continuously extended to enable the subsidized type to make its way in the competitive transportation system. If a particular kind or facility of transportation does not require a subsidy for its proper sustenance in meeting essential public needs, an unnecessary bounty is conferred. If a subsidy is required to sustain a certain type of transportation, the question shifts to whether there is a real and compelling public need for the particular transportation facilities which are thus made possible.'

"This is not a new problem nor one peculiar to Canada. It has been met many times, in many different guises in many countries; but always the answer is the same. Subsidies are dangerous. They are to be used only with caution and with a clear appreciation of the danger that what begins as an honest attempt to help the unfortunate may end as a cancerous growth.

"The alternative to a policy of subsidization is to allow the existing price system to work. One can admit all its drawbacks and still make the economic case for it on two grounds. The first is that it compels the taking of corrective steps as soon as disequilibrium develops. When government price-fixing and subsidization are used, the inevitable tendency is to postpone politically unpleasant action until it becomes inescapable. What could have been done in small corrective steps becomes a landslide.

"The second is really another aspect of that first point -- namely the self-cleansing capacities of a free price system. Those whose incomes are a charge on the public purse are not given to removing the source of their livelihood at the earliest moment that it can be dispensed with. It is so also with the receivers of subsidies. There are always reasons why subsidies should be continued, and if they are continued they end by growing themselves and by contributing to the creation of others. That form of waste is much sooner extinguished where responsibility is concentrated and where waste cannot be compensated by drafts upon public revenues. The result is that under a price system the community is healthier and more productive than it could

otherwise be. It gets a greater product from the same effort than it possibly could if it refused to submit to this continuous cleansing process."

As has been shown, one of the evils of transportation subsidies is that they tend to hide the true cost of transportation. It is also true that whether the subsidy be a transportation subsidy or not, the principal evil is this tendency to hide the true cost. If the system of subsidies is sufficiently extended (and, in fact, coupled with the tendency of those who have not obtained subsidies to press for them and the pressure of those who have obtained subsidies to press for greater subsidies) it tends to hide more and more the true cost of production of the materials of trade and commerce.

It is precisely here that we find the principal evil since this inevitably must lead to socialism. I should like to refer in this connection to a recent book called "Human Action" by Ludwig von Mises. I have not had time to read this book but I have read with the greatest interest a summary of the conclusions of the author which appeared in four instalments in the "Wall Street Journal" beginning with the issue of December 12th, 1949. I have had this summary reproduced for the use of the Commission if the Commission desires it. I have also copies for our provincial friends. These are photostatic copies. I am not going to refer in any great detail to these but there are some paragraphs that I think are right in point in my argument. I hope the economics professors on the Commission will excuse my rather naive attempt to understand the definition appearing here, but it seems to me that it helps my thinking, and perhaps may help the non-economic members of the Commission to understand it.

The first matter to which I should like to draw attention is the definition of the author of the term "economics". I may perhaps be forgiven by the two members of your Commission who are in the top rank of this profession, but I felt it desirable for my own purposes to resort to this definition. The Commission will see that it appears in italics in the centre of the first instalment of the summary. That is in the centre section of the little three column reproduction under the heading, "The Economist's Duty."

Economics is defined as --

". . . a science of the means to be applied for the attainment of the ends chosen, not, to be sure, a science of the choosing of ends . . . Science never tells a man how he should act; it merely shows how a man must act if he wants to attain definite ends."

My lay interpretation of this definition is that economics is a science which predicts the results of a certain course rather than a science to determine what the course should be.

The importance I attach to this is that we here are gravely concerned with the results which may be achieved by a certain course of action. I have concerned myself very largely in my argument with an attempt to set forward the view of the Canadian Pacific as to what results may flow if certain courses as proposed to your Commission were pursued. I can, of course, only give a lawyer's interpretation of what experts say and what experience has shown will be the probable result of those courses. I have, in particular, dealt with the threat to private ownership of the Canadian Pacific which some of these proposals contain. I think if I were to say what is the

principal purpose I have in mind in addressing an argument to your Commission, I would unhesitatingly give first place to that subject. The matter of subsidy is related to it.

The "Wall Street Journal" speaks of the work by von Mises as "possibly the most important economic treatise of our time". It seems to me that one of the most important arguments that could be addressed to your Commission on the question of subsidies is to be found in the summary to which I have referred, because, as I have argued, subsidies tend to obscure true cost. The summary of von Mises' book makes as its principal argument against socialism that the reason that socialism cannot succeed is that it has not solved the problem of what to do unless it can gauge its results by reference to cost.

Two extracts from the summary indicate what this problem is. These extracts are as follows -- this next extract will be found in the third instalment, December 14th, and immediately at the bottom of the first column.

"If one wants to call entrepreneurial action an application of the method of trial and error, one must not forget that the correct solution is easily recognizable as such. It is the emergence of a surplus of proceeds over costs. Profit tells that the consumers approve; loss that they disapprove."

Later in the third column of the same summary the author refers to consumers as the ultimate "bosses". That is right near the top. It is in the first complete paragraph in the right hand column of the third sheet. There he says:

"Investors expose their own destiny; this makes them responsible to the consumers, the ultimate bosses."

On the other hand the problem of the socialist is stated in the following language about the middle of the second column, a very short paragraph.

"The problem of socialist economic calculation is precisely this: that in the absence of market prices for the factors of production, a computation of profit or loss is not feasible."

The summary deals with the efforts of the socialist to find an alternative to this need for measuring results in terms of profit. The conclusion is that there is no substitute for the free market for this purpose.

In the last instalment near the end of the first column the following appears -- you will see that under the heading "Interference with Prices". I think this points up my whole argument on subsidies.

"Interference with the structure of the market means that the authority aims at fixing prices for commodities, and services and interest rates at a height different from what the unhampered market would have determined. In resorting to such measures the government wants to favor either the buyer -- as in the case of maximum prices -- or the seller - as in the case of minimum prices.

"The characteristic feature of the market price is that it equalizes supply and demand. But if the government fixes prices at a height different from what the market would have fixed if left alone, this equilibrium of demand and supply is disrupted."

The following additional paragraph in the second column is also important. That is just overhalf way down the second column on the fourth sheet.

"If one wants to correct their manifest unsuitableness by supplementing the first acts of intervention --

This has to do with the growth and tendency of subsidies.

" -- with more and more acts, one must go farther and farther until the market economy has been destroyed and socialism has been substituted for it."

Items 2 and 3 in the concluding statements are also important -- that is at the immediate end.

"2. Men must choose between the market economy and socialism. They cannot evade deciding between these alternatives by adopting a 'middle-of-the-road' position, whatever name they give it.

"3. In abolishing economic calculation the general adoption of socialism would result in complete chaos and the disintegration of social cooperation under the division of labor."

THE CHAIRMAN: When you use the word "socialism" in this connection, Mr. Evans, do you mean government ownership of all railways?

MR. EVANS: Yes, all means of production actually in the ultimate.

THE CHAIRMAN: Pardon?

MR. EVANS: It would be government ownership of all means of production in the ultimate. What I am saying here is that subsidies, particularly transportation subsidies and so-called indirect subsidies have their effect in obscuring the cost of production, and therefore they have the effect of producing artificial market prices. I do not ask this Commission to debate the question of socialism versus private ownership or free enterprise.

My point is that subsidies have been put forward here as the solution to the railway problem, and the subsidies that ~~are~~ put forward are of such magnitude that the true cost of goods, so far as the cost of goods is affected by the transportation charges, will be artificial. It will not be disclosed, and I say that if you do that often enough, and it tends to have its own germ of growth within it, you ultimately develop into an economy where the market is no longer the determining factor, and I say that is the inevitable result of socialism.

THE CHAIRMAN: Do you mean the procedure would be this, that the first step would be the government ownership of all railways?

MR. EVANS: Yes.

THE CHAIRMAN: Then the government would have to operate and manage those railways, set the rates and so on in a manner which would lead to more and more complete socialism in the country.

MR. EVANS: Yes.

COMMISSIONER ANGUS: Do you consider that the name The Government of Canada has given to the middle-of-the-road position is Canadian National Railways.

MR. EVANS: Well, I am rather diffident in expressing my view. I think however, that there is some reason to believe that the policy they pursued was wrong.

THE CHAIRMAN: Was what?

MR. EVANS: Was wrong. There was perhaps a dissenting opinion in the Drayton-Acworth report, as I recall it, by an American railroad man who was a member of that commission, and who felt that the government should not take over these railways and operate them. He said that the inevitable result would be large deficits, and he thought that the proper practice would be to go through

bankruptcy proceedings.

COMMISSIONER ANGUS: You see there is a suggestion in the paragraph at the top of page 75A that if you take one step you have to go the whole way. The contrary position might be if you have taken one step perhaps by taking another step you might get a better balance, a better stance and not go the whole way. Do subsidies on a limited scale not appear as taking that second step which perhaps improves your position, keeping these metaphors, so that it does not commit you to the whole journey.

MR. EVANS: You are not committed to the whole journey. My argument, however, amounts to this, that once you adopt the principle that subsidies are to be given to compensate for economic and geographic disadvantages it is practically impossible to resist the other fellow who comes along and says he has the disadvantages which ought to be compensated for. I am not saying it is impossible to stop it. We have subsidies in this country to far too great a degree, if I may say so. There has to come a time, however, when you say "No, we cannot go further with this", and I say that time has been reached. We have enough transportation subsidies in this country, and it has a snowballing effect. We now have six and perhaps even seven of our ten provinces coming forward here and arguing that the country in effect cannot afford to pay, that is, the shippers of the country, the consignees and consumers of the country cannot afford to pay the cost of operating its transportation system, and that the taxpayers should pay for it. To me, while you cannot say that is the inevitable result, it seems to me when you take into consideration human frailties that that mushrooming effect is almost the inevitable result. Is that an answer to you?

COMMISSIONER ANGUS: Yes. It would be possible to take this sort of line. As you have pointed out, there is probably going to be an increasing tendency for railway revenues to be provided for by long haul traffic rather than short haul traffic.

MR. EVANS: Yes.

COMMISSIONER ANGUS: One might proceed to say that the effect of that will be to make some industries uneconomic which in the past have been economic, to create submarginal producers at the end of the long haul in larger number than they existed before.

(Page 23260 follows)

COMMISSIONER ANGUS: If that is going to happen, it might be arguable that there you have a situation which should be mitigated by subsidies; and that a subsidy to the industry is rather a cruel thing to put into operation. It means that the industry is first depressed by rates that it cannot stand. Some farmers, shall we say, are squeezed into a sub-marginal position. Then they must go to Parliament and then they must get their subsidy with which to pay freight rates; and the political effects of that might be a little bit disruptive. An alternative way of putting this proposition would be this. There are at present two ceilings to railway rates, of which of course it is only the lower that is operative in any one sector of the country. There is the financial ceiling fixed by what the traffic will bear and there is the legal ceiling fixed by the rates which the Board of Transport Commissioners says are just and reasonable.

MR. EVANS: Yes.

COMMISSIONER ANGUS: Should there be a third ceiling settled by what the economy can stand without too great a jolt, and then only the lowest of the three would be operative, and if that bites into railway revenues, should they be compensated by a subsidy?

MR. EVANS: I am so opposed in principle to that that if I follow the implications of what you say, I would still be opposed to that. It seems to me that short of desperate need to build up marginal production, that is probably doing more harm to the other producers in periods of surplus. It may be that in war time you have to exploit these marginal sources of production. But without being hard hearted about it at all, it seems to me that the ordinary law of supply and demand takes care of that and that there ought not to be, as you say, the cruelty of

artificial stimulation and then withdrawal of the support which enabled that artificially-stimulated industry to live. I hope I have understood your question, Dr. Angus. I want to. I am no expert on economics, I can assure you. But my principle is there, that once you begin to do that - let me put it this way. If you have a marginal producer and you try to stimulate him, there are two kinds you could try to stimulate. There is one that must always be a marginal producer. The other may be an infant producer that only needs a little bit of easily-digested food in order to thrive and from then on he can go on his own feet. In the case of the marginal producer that must always be a marginal producer because of his long distance from market, because of the quality of the soil perhaps that he is on, that small amount of that is production may affect prices. It may affect them all over the world if it is wheat. I am not at all sure that it is desirable or necessary to put that fellow into production. He may have to produce enough for himself and his neighbour, but to put him into production to get into the world market is something that, with my limited knowledge of economics, is at least of doubtful value.

COMMISSIONER ANGUS: I am not at all sure of it either. But what I am really trying to consider, ^{is whether} if we are faced with the problem of that sort on a really large scale, the Board of Transport Commissioners fixing just and reasonable rates is the best method of dealing with it.

MR. EVANS: Oh no.

COMMISSIONER ANGUS: I think that there is there perhaps a political-economic issue that might require some other method of handling.

MR. EVANS: Oh, there may be. I have made it as clear as I can in my previous argument that we do not set our minds against subsidies in cases where a direct subsidy is paid

to an industry to prevent real hardship. For instance, in the depression period in the western provinces, I do not think anybody in this country could have stood by and have seen them starve.

THE CHAIRMAN: You would not call that a subsidy, would you?

MR. EVANS: Any assistance free --

THE CHAIRMAN: It was loans; it was grants and loans.

MR. EVANS: There has been a good deal of --

THE CHAIRMAN: Had we not better curtail the word "subsidy" to the sense we have been using it so far?

MR. EVANS: All I am saying is --

THE CHAIRMAN: Another thing. You talk about the inadvisability of putting people into production in some cases. You just said that.

MR. EVANS: Yes.

THE CHAIRMAN: Is it not a fact that every time you build a railway, you put people into production?

MR. EVANS: I did not quite put it that way.

THE CHAIRMAN: I am putting it that way. Is that not a fact?

MR. EVANS: Oh, quite.

THE CHAIRMAN: Wherever you extend a line of railway, people go in.

MR. EVANS: Yes.

THE CHAIRMAN: And they will start producing.

MR. EVANS: Yes.

THE CHAIRMAN: And in fact, I have no doubt the railways hope to see that happen.

MR. EVANS: Yes. But my point is that you ought not to put that person into production unless he can pay the cost of moving his goods to the market he chooses to exploit.

THE CHAIRMAN: But I am saying that the very fact that your railway is there causes him to go into production, does it not?

MR. EVANS: Well, I might argue this as an answer to that.

THE CHAIRMAN: That is why you go there.

MR. EVANS: Yes, sir. But my point is very different; because, we will say, a city has enough buildings, a man goes and establishes a shop. I think he might be very wise to look around and see whether there are not enough shops to supply the demand before he establishes it. But surely if he goes into another shop and sets himself up in business merely because he has the opportunity and the facilities, he ought not to be supported at public cost. That is my argument on the marginal producer.

THE CHAIRMAN: Yes. But I do not think that meets the case I am putting. It is not a question of opening another shop where there are already enough shops. But you extend the possibility territorially. You build a new line of railway.

MR. EVANS: Yes.

THE CHAIRMAN: In the hope and expectation that settlers will go in there.

MR. EVANS: Yes.

THE CHAIRMAN: And on going in there they must produce something.

MR. EVANS: Yes. But we do not build the railway in advance of any settlement; that is very rarely done. That was done in the western provinces, it is true, but it was done for a different reason. It was to connect up a province which had already a very considerable population and which otherwise would be isolated from the

rest of Canada. But you very rarely find a railway simply going into a barren country without any settlement and without any resources.

THE CHAIRMAN: No. But the fact that you want people is evidenced also by this fact I think, you yourself work for immigration and you try to bring people in.

MR. EVANS: Quite.

THE CHAIRMAN: Yes.

MR. EVANS: But it does not follow that they are marginal producers.

THE CHAIRMAN: It must be borne in mind that we are still a new country and at the same time a very large country.

MR. EVANS: Yes.

THE CHAIRMAN: And railway development has been something that the companies have striven for.

MR. EVANS: Yes.

THE CHAIRMAN: In rivalry with each other.

MR. EVANS: Yes.

THE CHAIRMAN: And we have today a certain state of affairs.

MR. EVANS: Yes.

THE CHAIRMAN: I do not think the time is here now when you can say, "This man had no business to start growing wheat"; I mean, in effect.

MR. EVANS: No. I do not say that.

THE CHAIRMAN: Well, you said you assimilate him to a man who opened a shop in a town where there already enough shops.

MR. EVANS: No sir. I am sorry, I have not made myself clear.

What I was talking to Dr. Angus about was the marginal producer.

THE CHAIRMAN: I know. That means marginal in respect of distance or market.

MR. EVANS: It might be, but it might be marginal in respect of the quality of his soil.

THE CHAIRMAN: Yes. But that is a different thing.

MR. EVANS: Yes.

THE CHAIRMAN: If he is trying to produce wheat on land that is not suited for it.

MR. EVANS: Yes.

THE CHAIRMAN: Of course, the farther away he is, the worse off he would be.

MR. EVANS: Yes.

THE CHAIRMAN: But that is a thing he should not do even if he is close to the market.

MR. EVANS: May be so.

THE CHAIRMAN: If the land is marginal in productive value, that is one thing.

MR. EVANS: Yes.

THE CHAIRMAN: Then distance is another sort of handicap.

MR. EVANS: Yes. But the marginal value of the land is a very great factor.

THE CHAIRMAN: I beg your pardon?

MR. EVANS: Marginal land and climatic conditions are very great factors in themselves.

THE CHAIRMAN: Sometimes you have both.

MR. EVANS: Yes.

THE CHAIRMAN: Climate and inferior quality of the land.

MR. EVANS: Yes. I am only dealing generally with the principle.

THE CHAIRMAN: When you use the word "socialism" here, taking it from the context furnished by this writer, for the moment you are saying that these repeated subsidies would lead to government ownership; to the railways / because all the provinces want them paid to the railways, not to the industry.

MR. EVANS: Yes.

THE CHAIRMAN: You say the would lead inevitably to government ownership of all the railways. That is what you have in mind?

MR. EVANS: Yes.

THE CHAIRMAN: That is what you mean, by the first step in socialism.

MR. EVANS: Yes. Then I say that this author points out that the reason for socialism, no matter how much it may be theoretically desirable on paper, can never succeed, because as it proceeds to its ultimate condition, it loses track of the market and the cost of its activity. It obscures the cost in the process.

THE CHAIRMAN: Yes, I know. That would be the result; if /the first step were accomplished, as you apprehend, and if a policy of subsidies were adopted and carried to extremes, it would lead to the cessation of private enterprise of railways and therefore government ownership of all lines of railways. Then the other economic consequences which the author mentions would be upon the shoulders of the government and of Parliament to deal with.

MR. EVANS: Yes.

COMMISSIONER INNIS: You do not think you could argue to the effect that some additional subsidies might be necessary to keep private enterprise alive?

MR. EVANS: I do not think there is any argument for that. If private enterprise is forced, because of political intervention, if you like, to accept subsidies

to keep it alive, that is the one thing. But what I am arguing is that you should not consciously pursue a policy of subsidizing because that is where you are going to end up; as long as you subsidize private enterprise sufficiently you are going to end up with the government with too close a control over the railways. One of the nicest examples of that kind of thing happened in the United States. The Government of the United States had given to the railways what they called land grants and in those cases they exacted from the railway an undertaking to make certain concessions in rates. This forced all other railways which did not have those agreements with the government to put in similar rates. It is only recently, after a most stormy career, that the land grants have been removed. That land grant concession has now been removed by law. But what actually happened was that by exacting contracts of that kind, and forcing other railways who are in competition with these railways to do that, they had actually got to the point where these land grant claims were almost threatening the solvency of some of the roads. I could go into that in some detail, but it does seem to me that once you start the government into a railway, it goes the whole way; unless it is just the . . . temporary relief such as perhaps in a depression time.

COMMISSIONER ANGUS: I am little bit frightened, you see, by the references . . . to an American periodical, the Wall Street Journal, which has a very definite point of view and to an Austrian writer who has a very definite point of view, to the danger of becoming a little bit European, shall I say, a little bit obsessed with these ideologies and not keeping constantly in touch with the problems as they arise. It seems to me that you might well argue that since you are committed in Canada to a series of subsidies of one

sort or another, ranging over almost every industry including transportation, that you may well be faced with the problem or the continuing problem of subsidy in order to keep private enterprise alive rather than to try to step back and allow private enterprise to drift into the position which you fear.

MR. EVANS: There are two points on that. I understand that Von Mises has been living in the United States for many years. It may well be that the Wall Street Journal published that summary because it believes firmly in the principles espoused by Von Mises. It does seem to me that that summary which is coached in language used by the author himself, are so beautifully reasoned that they commend themselves. I do not know anything about his standing as an economist. It is the reasoning that ^{it is} appeals to me; not merely because I happen to espouse private ownership myself, but the reasoning in that to me is something that I should like to see an answer to. He says, for example, that the prime difficulty with socialism is this question of financial cost, and he says that the only reason that these socialistic countries have been able to carry on is because they have some remaining countries where the market economy prevails, and they have some measure against which they can measure their own results. So that I do not think one can apply as a binding authority on any commission or anybody, the opinions of an author. I only offer them because I think they are, with my very limited understanding of the subject, well reasoned and worthy of comment. My inclination in putting this forward would be to ask this Commission to adopt that reasoning as my argument and without regard to the author of it. I think that the reasoning in this commends itself.

COMMISSIONER INNIS: But all ideologies are beautifully reasoned. I don't need to tell you as a common lawyer that the common law is always compared above reason. One has to face the situation as it arises.

MR. EVANS: Of course, law can never be pure reason because one has to deal with Statutes, and I think that no one could suggest that Statutes arise from pure reason. I have seen many that didn't.

THE CHAIRMAN: Can we take it that your warning is that this policy of subsidies, if allowed to grow and extend, would mean the end of private railway enterprise in Canada?

MR. EVANS: I believe so most firmly, yes.

COMMISSIONER ANGUS: Mr. Evans, as I understand the article (I have not read it), as I understand the line von Mises is following it really is in favour of uncontrolled private enterprise, that is to say, as soon as you bring in some element of control you get away from this type of argument. May I illustrate? You may have part of your line which you would like to abandon, because you think you are operating it at a loss. When you apply for permission to abandon, that is refused. That refusal is itself an Act of socialism in von Mises' sense.

MR. EVANS: I quite agree.

COMMISSIONER ANGUS: And somebody has to pay for it.

MR. EVANS: Yes.

COMMISSIONER ANGUS: Now, the fellow who has to pay for it is apparently this man who is paying the long-haul rates on his commodity. Now, your argument is that you must not conceal the cost of transportation, but aren't you really concealing it there, aren't you making the man who ships his commodity a long distance pay not

only for carrying that commodity but also pay for indemnifying you for operating a line that the Government will not let you abandon; that is to say, then you get a concealed element in the cost that you are asking him to pay. Now, is that fairer in any sense than meeting that cost that you have to meet on an unprofitable line from a Government subsidy?

MR. EVANS: Well, I can quite see that the logical application of the principle that von Mises here has set forth, could be carried to the extent which you suggest. Now, I think that you might make an argument that these lines ought to be abandoned, and I don't think it would necessarily be bad that they should be abandoned.

COMMISSIONER ANGUS: No, but if you keep them in operation, if the Government takes that step - -

MR. EVANS: If they force you to.

COMMISSIONER ANGUS: I mean, if the Government forces you to keep that line in operation, is it in some sense better that the costs should be defrayed by excess charges on long-haul commodities than that it should be defrayed by a Government subsidy? Is there anything in your argument or in his to meet that point?

MR. EVANS: I don't think those are the only alternatives. If a line is of thin density and has no economic justification, but nevertheless the railway is forced to operate it, it seems to me that once the railway company has asked permission to abandon it and sees no commercial possibilities in it, that an argument could be made that if the Government forces you to operate it, they ought to pay something towards the cost of operating it. I would not go any further than that. But, when you say that that in effect

imposes additional costs on long-haul traffic, I don't think you can suggest that is all on long-haul traffic. It applies to all traffic. Some small part of the additional cost of maintaining that deficient line is spread throughout the rate structure.

COMMISSIONER ANGUS: Yes, but we are told that this is a time when there is a tendency to shift the source of railway revenue from the short-haul traffic of high grade commodities to the long-haul traffic of cheaper commodities; and if that tendency is dominant at the period when an increased cost occurs, isn't it likely to follow the tendency?

MR. EVANS: Well, if I may say so, I think the suggestions of that kind have been grossly exaggerated. My suggestion is that any large commercial business has to meet new conditions. Now, it may be that the pressure of competition on a railway could have good effects as well as bad effects, and its good effects may extend to the long-haul shipper just as readily because the pressure of competition has a benefit. The difficulty we are facing today is that the competition is unfair. If we could get completely fair competition with the motor truck for example, then we would have a clear choice whether we would carry some of that short-haul traffic by motor trucks ourselves or we would let it go, and I think we would then have to make up our minds, so we would then be able to cut our losses, increase our efficiency, and in the end I think perhaps profit would flow to all shippers including the long-haul shipper. But, there is no answer by merely restricting and restricting the railways and preventing them from making a proper adaptation to the new conditions through the use of capital.

I don't know what we can predict for the future,

but let us not rush into the acceptance of the idea that the long-haul shipper is ultimately going to pay the whole shot. I don't believe that for one moment, and I don't believe that a vigorous, healthy railway system in this country is going to have that happen, because it is just as bad for it to happen so far as the railways are concerned as it is for the long distance haul. It seems to me that at that stage you may have to decide whether you are going to abandon railway service in Canada altogether. I don't believe that .

THE CHAIRMAN: You used the expression about the long-haul shipper paying the whole shot. That is not what is ascertained. Isn't the assertion rather that he is paying more than his fair share?

MR. EVANS: Yes, but ultimately if you had this competition proceed to a sufficient degree, you might have the whole cost of the transportation borne by the long-haul shipper. That is taking the extreme case,

It may be said that this is again an argument based on the extreme case. Again I say that if one obscures the true cost and therefore the true price of a commodity or of a service, one takes a step along the way to socialism because of the tendency which I have pointed to of being unable to restrict subsidies to a limited few.

In this connection the Commission will recall Mr. McDougall's discussion with Commissioner Innis following upon his evidence to the effect that if subsidies were to be granted they should not be distributed by a central authority. His view was that a distribution by central authority (p. 17783) is too far removed from the community which received them. This was because a central authority would not distribute

subsidies as efficiently or as intelligently as would local authorities. Commissioner Innis drew attention to the fact that the fundamental practice of the power that controls the purse having also control of expenditures, would be violated. Mr. McDougall's answer at p. 17791 at the bottom of the page was as follows:-

"If you want to say that I do not like subsidies and therefore would like to keep it to the absolute minimum, yes, you are quite right, I don't."

This rather points up one of the difficulties with subsidies. One gets into all kinds of questions such as this. It may sound reasonable to suggest that the giver of the subsidy should have absolute control over its distribution but, as Mr. McDougall says, this tends to result in waste and inefficiency in dealing with subsidies. His evidence of course, is an indictment of the whole idea of subsidies because of this among other difficulties.

All I am saying to your Commission in this connection is this -- let us not delude ourselves that subsidies are good or that they can in the last analysis be efficiently distributed. Let us not delude ourselves as to the consequences which attend upon the making of subsidies and their effect on the market price of goods and services. Let us not, moreover, delude ourselves that there is a half-way measure between the free market and socialism. Let us, therefore, reject the principle of subsidies.

If we approach the suggestions made to your Commission about subsidies with this principle firmly in mind, the evil can be curbed and kept in its proper

place. This can be done by recognizing that while drought and depression, such as that suffered by Western Canada in the thirties, in all humanity, called for relief at the expense of the taxpayer, subsidies should in such cases be paid directly to those who need the relief. They should not in any way take the form of subsidizing a portion of the services required in the process of production and distribution. Above all, they should not take the form of hidden subsidies where, after a time, no one can say what is the effect upon prices.

In my submission, if this principle were applied, there would be no extension of the Maritime Freight Rates Act, either as the Maritimes themselves propose or as Saskatchewan proposes or as has been proposed for the grain rates. Subsidies would be left for those instances of emergency and difficulty where no other form of aid will prevent hunger and economic collapse.

We are far from that in this country today. We will have our ups and downs just as any other country or economy has its ups and downs. Let us not in these times talk in terms of depression times. Let us recognize that the nearer we can come to the ideal of having individuals pay the full cost of the services they use, including transportation services, the less is the danger that this country shall fall into a state of socialism.

I turn now to the question of

HORIZONTAL INCREASE

If there is one thing that has been amply demonstrated it is that all of the provincial governments are opposed to the horizontal increase as a means by which railway companies may obtain the additional revenue

which they need. I submit that the argument of the provincial governments on this subject has largely resulted from misconception.

The point I made earlier is that your Commission should examine the Railway Act to see whether the powers of the Board are sufficient to provide any remedy which may be found to be necessary in respect of the complaints which have been made to your Commission.

It is here that the lack of precise definition as to the scope of your inquiry puts us in some difficulty. It is not my purpose to argue the question of scope. Our position on that matter is set out amply in our brief (Part I pp.16-32). However, I point out that if the scope of your inquiry is limited to matters in which your Commission would be asked to recommend changes in legislation, the long discussion with regard to horizontal increases and a number of other matters would have proved unnecessary. As it is, we have had to assume that the representations on this subject have been made on the footing that your Commission may nevertheless express an opinion one way or another on the subject.

THE CHAIRMAN: Pardon me, Mr. Evans, I am not so sure I should let that pass. You say that if our recommendations are to be confined to changes in legislation --

MR. EVANS: Yes?

THE CHAIRMAN: Then such matters as the horizontal method of increases would be beyond the range of what we --

MR. EVANS: I was not putting it that way. It would have been unnecessary to spend as much time.

THE CHAIRMAN: That is what you seem to be saying here. That doesn't necessarily follow.

MR. EVANS: Well, if you are limited to requests

for legislation, it would seem to me that no one has come forward with a suggested amendment to prevent horizontal increases.

THE CHAIRMAN: That may very well be, but that does not preclude the Commission in any way.

MR. EVANS: I am not arguing the question of scope. All I am saying is that we found ourselves in some difficulty.

THE CHAIRMAN: I am not telling you because I do not know what the Commission may ultimately do, but there would be no reason, for instance, why such a matter as the method of that increase might not be legislative.

MR. EVANS: I see. At all events ---

THE CHAIRMAN: I am not saying they are going to be.

MR. EVANS: At all events, I did want to address myself to the question of horizontal increases and I was in some doubt as to how far I had to go with it.

THE CHAIRMAN: You say, right now the matter is one wholly within the power of the Board.

MR. EVANS: Yes.

THE CHAIRMAN: And nobody has so far asked us to change that.

MR. EVANS: Yes.

THE CHAIRMAN: Now, you can stay there if you like.

MR. EVANS: Well, I had concluded that I could not afford to stay there.

However, my submission is that the subject is plainly one on which your Commission should make no recommendation. It is obviously, I submit, one for consideration and decision by the Board in the exercise of its jurisdiction. The Board has heard and dealt with similar representations in the last two rate cases and has now before it under the provisions of P.C. 1487 a general inquiry into the freight rate structure. One of the matters expressly referred to in P.C. 4678 as encompassed within the provisions of P.C. 1487 to be dealt with on this inquiry is this matter of horizontal increase. In my submission, therefore, it cannot be demonstrated either that the merits of the contentions of the provinces have not been dealt with by the Board under its present powers or that they are precluded from making such further representations as they may see fit to make in the general inquiry.

It is clear that even in the United States the I.C.C. does not uniformly apply exceptions to horizontal increases. It would be manifestly improper to reject the principle of such increases by statute or for that matter in any general direction. Such a course would tie the hands of the regulatory tribunal in such a way that it could not in any circumstances authorize flat percentage increases even though the circumstances should plainly point to the propriety of such an increase.

The position of Manitoba is stated in a number of places in the transcript but perhaps the clearest is that contained in Mr. Moffat's cross-examination by my friend Mr. O'Donnell at p. 9564 (Vol. 50):-

"I want to find out if Manitoba thinks that the statute should provide something specific about horizontal increases....what you say is that they should not be straight percentage increases right

across the board?

A. All the time.

Q. Do you think the statute should say something about that?

A. No, this is a case where it seems to us that the statute should not restrict the policy which is to be adopted in any way."

THE CHAIRMAN: You see the word "policy" there. Mr. Moffat's use of the word was rather loose, wasn't it?

MR EVANS: Well, I think so; but I think it is clear there, isn't it?

THE CHAIRMAN: While he used the word "policy", he said on several occasions that the policy was to be fixed by the Government, and it should direct the Board as to what it should do.

MR EVANS: I think he went on to say later that the Governor in Council should be able to tell the Board when horizontal increases should be put in, but he would not want the statute -- and I interpret his use of the word "policy" there -- he said he would not want the statute to interfere with or restrict the policy to be adopted by the Board. He wanted the Governor in Council---

THE CHAIRMAN: To bring about what was his real desire, though, I think would necessitate providing that the Government should indicate on each occasion whether the increase should be horizontal or should be in another method; isn't that so?

MR EVANS: Yes, I think he did.

Later on the same page Mr. Moffat said:-

"...this is a case where it might be very desirable to have a directive from the Government upon occasion."

Asked by the Chairman as to whether it was Manitoba's view that the Government might say:

"Now this year you are using horizontal increases and the next year you will go back on that and use some other kind."

"A.. I think that is very desirable in this particular case because in this particular case if --

Q. I wish somebody would tell me where the Government is going to get the time and the ability to do these things. Could you answer that?

(P.9565) A. I don't know where they get the time and ability; they do have to deal with these big most important problems of economic policy."

Later on the same page Mr. Moffat stated that the alternative is to put it in the statute and he thought it undesirable to do so because --

"...they must sometimes use horizontal increases and sometimes use a straight increase of so much per ton."

It was at this stage of the discussion that the Chairman referred to the earlier request made to Mr. Shepard to obtain instructions from his government.

The Commission will recall that when Mr. Shepard got his instructions he merely stated that the position taken by the Province of Manitoba had been confirmed and he offered the amendments to Sections 38 and 52 giving the Governor-in-Council authority to give general directions to the Board in matters of policy, (Section 38(2)) and in any particular case to remit any matter to the Board for directions respecting the disposition thereof. (Section 52(1)).

THE CHAIRMAN: Those are the ones which provide for the Government giving---

MR EVANS: Yes, they are.

It must, therefore, be assumed that Manitoba has

rejected the idea of statutory change with regard to horizontal increases. Manitoba's view is apparently that under the amendments referred to, the Government might direct the Board on the matter of horizontal increases either under the powers with respect to general policy matters in the new proposed Subsection (2) of Section 38 or in special cases under the appeal provisions of Section 52(1) as amended.

Manitoba has not said in this connection how the Government, as the Chairman put it, could find the time and the ability to decide either generally or in a given case whether or not it would be proper for the Board to grant a horizontal percentage increase.

It is still more difficult, in my view, to reconcile the position of Manitoba. On one hand it rejects the statutory amendment on the ground that the Board might have to put into effect a horizontal increase in some circumstances, while on the other it suggests that the Government, as a matter of policy, should say when, if at all, a horizontal increase would be justified.

The difficulty with this reasoning is, in my view, insurmountable. Quite obviously, the Governor-in-Council could not lay it down in general terms in any more satisfactory way than could a statute. It follows therefore that Manitoba really is contending that in special cases the Government's power would be exercised under the proposed amendment to section 52(1). This means that the evidence and argument before the Board would simply be reviewed by the Governor-in-Council and the Board's discretion in the matter completely removed. Unfortunately, however, the Board would not know in any given case whether the exercise of its discretion, no matter how well supported,

might be tossed aside by a decision of the Governor-in-Council.

With regard to Alberta, I have been unable to find in the transcript any suggestion that Alberta favours a statutory provision covering the question of horizontal increase. It is clear from the amendments submitted by Alberta that that province does not provide for such an amendment. At the moment we have no indication from Alberta as to whether or not they support the proposed amendments of Sections 38 and 52 proposed by Manitoba.

MR FRAWLEY: Mr. Chairman, I am quite sure my friend has overlooked what I said. I said that I supported Mr. Smith with regard to his amendment on horizontal increases.

THE CHAIRMAN: Would you repeat that?

MR FRAWLEY: I have already said that I support Mr. Smith in the matter of horizontal percentage increases, and I have already said that I support the amendment Manitoba is making to section 52(1), and I have said nothing to Manitoba's amendment to 38.

THE CHAIRMAN: 52(1), what is the effect of that?

MR EVANS: That is the amendment by which the Governor in Council acting on his own motion or on application or petition may remit matters to the Board with a direction as to the decision they are to give.

THE CHAIRMAN: Well, does that expand anything? How does that deal with the matter of horizontal increases?

MR FRAWLEY: Oh, no. In this paragraph my friend has just read, he says ,

"At the moment we have no indication from Alberta as to whether or not they support the proposed amendments of Sections 38 and 52 proposed by Manitoba."
And I say I am sure he overlooked what I said. I have al-

ready said that I support Manitoba with regard to 52. I say nothing about Manitoba's amendment to 38. Now, as to horizontal percentage increases---

THE CHAIRMAN: You support Manitoba's proposed amendment to 52?

MR FRAWLEY: To 52.

THE CHAIRMAN: No matter what the results may be; we are not discussing that now.

MR FRAWLEY: No. I go along with Manitoba with regard to 52(1). I did not draw any amendment of my own; I adopt Manitoba's. That is the position.

MR EVANS: I am merely pointing out that the only way that I can see that this could affect horizontal increases is that if the Board had exercised its discretion and decided that there should be a horizontal increase, then after all that had been done the Governor in Council would simply change the order and order otherwise.

THE CHAIRMAN: Well, that is the case today.

MR EVANS: I do not think they could do that.

THE CHAIRMAN: Well, I mean, under the very wide power which you apprehend the Governor in Council has under 52.

MR EVANS: They could as an express variation or rescission of an order, but if they rescinded an order, then the Board would presumably act again. If they vary it--

THE CHAIRMAN: But the power does not stop at rescinding, as you know.

MR EVANS: No, but if they vary it, then the Governor in Council has to take the responsibility of saying what the variation is.

THE CHAIRMAN: That is right. I do not think any real change is made in that. Whether they vary it themselves or set the Board to vary it in the same way, they

are taking the responsibility.

MR EVANS: I think there is quite a substantial practical difference.

THE CHAIRMAN: It looks offhand to me to be quite unnecessary. That is, if the Government themselves say, "We think this ought to be changed, and instead of this horizontal increase the Board has granted we will grant another, and we tell the Board to substitute this one for theirs, we direct them to dispose of the case in this way"---

MR EVANS: May I give you what I conceive to be perhaps an answer to that?

THE CHAIRMAN: Yes.

MR EVANS: Let us suppose that the Board said there should be a twenty per cent increase horizontally. Under the present section the Governor in Council has to vary or rescind. Now, let us leave aside the question of rescinding; say they vary it. All right, the Governor in Council has to take the responsibility of saying it should be fifteen.

THE CHAIRMAN: Or that it should not be horizontal.

MR EVANS: Or that the increase should be so much per hundred pounds.

THE CHAIRMAN: Yes.

MR EVANS: Now, the Governor in Council quite obviously is in no position to do that. They can only -- and I think the intention of the section is, as it now is -- they can only vary or rescind where there has been a mistake in principle; but if they can send it back with directions, they could simply send that back to the Board and say, "There must not be a horizontal increase at all."

THE CHAIRMAN: Well, that sounds as if the section is not so fearfully dangerous as you thought it was

at the beginning.

MR EVANS: I say that the principle of the section is bad. I say it is much worse with Manitoba's proposal; as a practical matter it is much worse.

THE CHAIRMAN: Well, the section says:

"The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind" -- vary, you see -- "any order, decision, rule or regulation of the Board, . . ."

Now, there is no limitation there.

MR EVANS: No, sir. I was saying---

THE CHAIRMAN: Suppose then the Government does vary an order of the Board which granted a horizontal increase, and puts in the variation; that makes it an order. Now, they say, instead of doing that they want him to have power to send it back to the Board and to direct the Board to vary it in this way.

MR EVANS: Yes, but that is not the way it would work.

THE CHAIRMAN: What addition does that give?

MR EVANS: That is not the way it will work, sir, with respect.

THE CHAIRMAN: That is not the way it will work?

MR EVANS: That is not the way it is going to work.

THE CHAIRMAN: To direct the Board after the disposition thereof.

MR EVANS: Yes, but, you see, I am saying they are both bad, and I do not want to repeat my argument of yesterday, but the present section is bad and the amendments make it worse. That is all I say. Now, I can give

you, if you think it will be helpful---

THE CHAIRMAN: I do not see that the amendment adds anything to it, but perhaps I will see it later on.

MR EVANS: Well, as a practical matter -- I do not say theoretically; I said to your lordship yesterday that theoretically there is not any, but as a practical matter the Governor in Council cannot, for example, vary the amount of an increase, because it will not have the capacity or the knowledge upon which it could vary an order of an increase.

THE CHAIRMAN: I thought that was the very thing, or one of the things, you were afraid of, that they have the power to do it whether they have the knowledge or the ability or not.

MR EVANS: Well, as a matter of power they have, sir, but as a practical matter they could not vary an order in such a way that they would substitute flat cents per hundred pounds for a percentage increase; but under the change all they have to do is send it back and direct the Board to do it, and then the Board, with all the knowledge it has, is bound to do it. As a practical matter I say there is a great difference.

THE CHAIRMAN: Well, I do not see why they could not do that very thing today. They can make any order they like, and why can't they make that sort of order as the section stands -- send it back to the Board and direct the Board to dispose of this application on one basis instead of the other?

MR EVANS: Well, a direction to the Board to dispose of it would, in my opinion, be ultra vires of the Governor in Council.

THE CHAIRMAN: You think so?

MR EVANS: Yes.

THE CHAIRMAN: That is, they can do everything except that.

MR EVANS: Yes.

THE CHAIRMAN: You told us yesterday that you interpreted this Act even to the extent of saying they could do things not authorized by the Act at all.

MR EVANS: They could rescind; they could rescind an order of the Board or vary an order of the Board, even though it was the plain duty of the Board to make that order, because it is binding on all parties and binding on the Board.

THE CHAIRMAN: Well, we certainly have to give careful study to the section.

(Recess)

(Page 23289 follows)

---On resuming.

THE CHAIRMAN: I understand the subject under discussion is still horizontal increases.

MR. EVANS: Oh, yes.

THE CHAIRMAN: Tell me this. In all these appeals which have been taken so far to the Privy Council, has it ever been argued there that the Board should not increase on a horizontal basis?

MR. EVANS: Yes, in the last one and the present one.

THE CHAIRMAN: What did the government say about that?

MR. EVANS: In sending it back to the Board to review the 21% judgment they said that the matter of horizontal increases was all covered by P.C. 1487 in the General Inquiry. In effect they said that was for the Board.

With regard to the Maritime Provinces, these provinces have been among the most vociferous in opposition to horizontal increases. Mr. Smith (page 14673, Vol. 72) would not go so far as to advocate the abolition of the horizontal increase "in its entirety".

His objection relates (same page) to the "matter of the distribution of the increase that bears heavily upon the shipper and producer in the extremities of Canada and particularly with reference to basic commodities."

At page 14683 - "there should be a declaration of policy embodied in the Railway Act . . . so that the Board has a compass." Later on the same page he said that "No, the Board is not lacking in the power now."

THE CHAIRMAN: Since you have quoted his words will you tell me what is meant by "there should be a declaration of policy embodied in the Railway Act"?

MR. EVANS: I cannot interpret Mr. Smith's argument.

THE CHAIRMAN: You have taken the trouble to quote him. Does he go on to say what the policy should be in that regard?

MR. EVANS: I think in his argument he introduced amendments to Section 325 by which he added three subsections which he thought might give him the relief he wanted.

Mr. Frawley (page 14693) - "We want the Board directed that there must be no flat horizontal percentage increase, with nothing else, with no governing maxima applied."

" . . . it can only be with maxima applied in cents per hundred pounds."

THE CHAIRMAN: I think Mr. Frawley was told that if he wanted a direction it would have to be statutory.

MR. EVANS: Yes. I am commenting on the fact he has not come forward with one.

Where do they draw the line? At page 14686 I said no one has defined what was a "long haul."

Mr. Frawley, asked by the Chairman, "where do you draw the line" said, "I would be foolish to say that I could tell the Board just where the long haul line should be drawn."

At page 14694 he said: "Once the principle is there . . . that there must be no flat horizontal increase and nothing else we should go into the Board prepared to argue the point."

For the purposes of this stage of my argument

my submission is that the Board has ample power as the matter now stands. A So far as Manitoba's proposals for legislation are concerned, these are bad in principle and should not be relied upon to provide the remedy if any is required in the matter of horizontal increase. I am speaking there of the Governor in Council doing it.

In my view also if the suggestions of the Maritimes for amending Section 325 are designed to deal with the matter of horizontal increase, I respectfully submit they are worthless for that purpose and provide only a mass of legislative language which it is almost impossible to interpret.

I should now like to turn to an examination of the merits, or perhaps I should say, lack of merits in the sweeping opposition to the principle of horizontal increases.

The contentions are relatively simple. Our provincial friends submit that if a rate from B to A is 50¢ and the rate from C to A is \$1.00, a percentage increase of 20% would increase the rate of 50¢ by 10¢ and the rate of \$1.00 by 20¢. They contend that producers and shippers at C (the long haul point) have established a rate relationship merely because of the existing difference in rates under which the producer at C pays 50¢ per 100 lbs. more than his competitor at B. Their contention is therefore that if 20% is added to both rates the relationship is disturbed because thereafter C pays not 50¢ but 60¢ more than his competitor at B.

They go further and assert that rates within regions for the same mileage are different and that a flat percentage increase would add to the disparity thus existing. The Board in its judgment in the 21% Case, XXXVIII J.O.R. & R. at page 58 held:

"These rate differences as such resulted from the rate increases and reductions made and certainly cannot be properly described as the Competitive Rate Relationship."

That is probably one of the fundamental misconceptions that pervaded the argument on horizontal increases. Rate differences have been called by the Provinces rate relationships. In the 21% Case the Board very carefully set out a table showing rate differences, and what would happen to those differences, and they said those can never be called competitive rate relationships. The problem put forward by the provinces is this, if there is one man has a longer haul than a second man, his competitor, the difference between their rates at a given time is a rate relationship. That is what the Board has said is not a rate relationship. It may become a rate relationship by usage or by custom or by finding, but mere differences are not rate relationships. That is the clear finding of the Board at page 58 of that Judgment.

In the example I have used, it is certainly probable that some competitive relationship -- I am distinguishing between rate relationship and competitive relationship -- may exist between producers at points B and C.

As I pointed out at page 14686 (Volume 72) -- no one has sought to define what was to be considered as "long-haul". In the absence of such a definition no one could possibly say what the maximum increase in cents per hundred pounds would have to be in order to satisfy the provincial contentions.

The Chairman at page 14694 made this point to Mr. Frawley and all that Mr. Frawley could say was that the principle of maxima should be accepted and that the

Board would have to work out, on the representations of the provinces and the industries, what those maxima should be.

My suggestion is that this extremely general statement of Mr. Frawley's is not good enough upon which to base a general attack upon the principle of horizontal increases. If there is any case to be made against a horizontal percentage increase it must be made on particular circumstances and only then, in my submission, when a very strong case has been made out.

I propose to examine the case as made out to demonstrate that this case against the horizontal increase does not stand up. Before I do so I desire to put the case, as shortly as I can, for the view taken by the Canadian Pacific.

The case for the Canadian Pacific on the point is found at pp., 55-63 of Part II of its Submission and was supported by Mr. Jefferson and Mr. McDougall in the witness box.

In the main it can be said that our case comes down to this:

In the example I have just given, if the shipper at C, who before the increase paid 50¢ more than the shipper at B, or double B's rate, will still pay double B's rate after the increase of 20% in the example, it is difficult to understand how C's position is worsened if all C's costs of production as well as his selling price have at least doubled.

There is, of course, this one qualification, that increases in freight rates have come after so serious a time lag that producers have, for substantial periods after the price rise has set in, become accustomed to having their higher prices without an increase in the cost

of transportation. They may thus have tended to rely upon the lower rates to a greater degree than would have been justified if the increases had followed more closely the trend of other prices. In this way certain shippers have perhaps over-extended themselves and feel themselves hurt if later a percentage increase is applied uniformly to all rates.

However, in the example I have taken, C after a percentage increase, is no worse off as compared with B than he was before the inflationary cycle began. If his price has been increased proportionately more than the percentage increase in freight rates, as has usually been the case, both B and C are better off than they were before and the relationship between the two is the same. That is to say, C will still pay twice as much by way of freight rates as B.

On the other hand, if a maximum increase is applied rather than a flat percentage increase, C gains an advantage over B. This is all amply demonstrated by the tables on pages 57 and 58 of Part II of the Brief. The effect of the maximum increases as compared with that of the flat increase is shown in Item C on page 58.

The next point in favour of horizontal percentage increases is this:-

Taking the same example of the rate from B to A at 50¢ and the rate from C to A at \$1.00, let us assume that the mileage from B to A is 300 miles and the mileage from C to A is 800 miles. I pause to point out that the reason that the rate doubled only with an increase of nearly three times in the mileage is the effect of the taper in the rates. That is not a specific case; it is only an example. With a percentage increase of 20% and a maximum of 10¢, both B and C obtain the same increase in

cents per 100 pounds since 20% of B's rate is 10¢ which operates as a maximum.

It follows from this example, which I submit is typical, that the only real justification for any claim by C to have the same increase in cents per 100 lbs. as B, must be based upon the theory that the cost of the haul with the difference in mileage between 300 miles and 800 miles has not increased. I say this because the increase in rates received by the railway is exactly the same for a haul of 300 miles as it is for a haul of 800 miles. I suggest that such a contention, which assumes that the cost of hauling the commodity for the extra 500 miles has not increased, is absurd on its face.

I further submit that any method of increase which makes such an assumption involves the payment of an indirect subsidy to C because although the cost of transportation has undoubtedly increased, C is still able to get transportation for 500 miles or 5/8ths of his total mileage without any increase in rates.

If anything further is needed on this point, I ask your Commission to look at Exhibit 192. That exhibit was filed by Mr. Liddy in answer to a contention by Mr. Moffat at page 8695, (See also p. 111 of Manitoba's Brief) that terminal costs "have probably increased more sharply than line haul costs."

This contention of Mr. Moffat's was put in support of the argument against horizontal percentage increases. The importance of the point made by Mr. Moffat is that the reason for rates "tapering" with distance is that in a given case terminal costs at origin and destination tend to be the same for short hauls as for the longer hauls. While this is not always true because of the use of intermediate terminals in many cases

it can, generally speaking, be accepted as true. It has always been regarded by the railways and by the Board that it is proper that the rates should be relatively lower for longer distances than for shorter distances because terminal costs are common to both. Now then, if terminal costs tended to rise more rapidly than line haul costs, some case could be made either for a greater rate of taper in rates than now exists or alternatively for some relief on the longer hauls from the impact of percentage increases.

Your Commission will note that I have put these in the alternative although in the Manitoba Brief the argument is really used to support relief in both respects. In my submission the same reasoning cannot support both of these alternatives but only one of them. Exhibit 192 shows quite clearly that Mr. Moffat's assumption that terminal costs have risen more "sharply" than line haul costs is unwarranted. To be fair to Mr. Moffat, it should be said that the Brief clearly admits that Manitoba had no data upon which to base the assumption.

Mr. Liddy, in commenting on Exhibit 192 (p. 16794, Vol. 86) said that he chose to analyze transportation expenses because they are more directly related to actual movement of traffic and "also because they can be allocated more easily to terminal and line haul operations than the other operating expenses."

At the bottom of the same page Mr. Liddy gave his conclusion that:-

"From the results of this analysis the fluctuations in terminal costs and line haul costs appear to have been very much the same over the period under study."

The period studied in Exhibit 192 was twenty-five

years ending in 1948. Mr. Liddy found, as he said, "no evidence supporting Mr. Moffat's suggestion".

There are two further points I desire to make before passing to an examination of the I.C.C. decisions so largely relied upon by Mr. Smith for the Maritimes.

The first is this -- Alberta is complaining on the one hand against the transcontinental rates on the ground that they are lower between Vancouver and Eastern Canada than to and from Alberta points. On the other hand, Mr. Frawley is perhaps among the most vociferous opponents of horizontal increases. My suggestion, without elaborating it, is that maximum or flat increases in cents per hundred pounds will accentuate Alberta's disadvantage, if any, in regard to the so-called long-short haul discrimination. And if Mr. Frawley replies that he would make an exception and apply a horizontal increase to the transcontinental rates, I ask him whether, in view of this statement at page 14694, (Vol. 72) he can have his cake and eat it too. (i.e., no horizontal increases.)

The other point is this: for every long haul shipper who gets relief from horizontal percentage increases by the device of maximum or flat increases in cents per hundred pounds, there will be a short haul shipper objecting to it. This is exemplified by the position of the coal operators in Saskatchewan and New Brunswick all complaining of the increase in cents per ton as applied to coal on the ground that it destroys their geographic advantage. They argue for a percentage increase.

My point is that most of those who complain, if maximum or flat increases were applied in lieu of percentage increases, have not been heard by your Commission. No one can safely assume that they will be content if

there should be any idea of prohibiting by statute or otherwise the application of flat percentage increases.

There is one further matter which I should mention. The Maritimes contend that flat percentage increases should not be applied to the Maritime arbitraries. This is a matter which can be shortly dealt with.

The Maritime arbitraries are so called because they are factors in through rates between ^{the} Maritime provinces and points West of Montreal. That is to say, a flat rate in cents per 100 pounds is added to the rate East of Montreal. It is for this reason that they are called arbitraries.

I should have said "West" of Montreal. It is added to the rate west of Montreal. The arbitrary is for the portion east and it is added to the rate west.

THE CHAIRMAN: Pardon?

MR. EVANS: The arbitrary covers the portion east of Montreal and it is added to the rate west of Montreal.

THE CHAIRMAN: That is what you are saying here. You say:

". . . a flat rate in cents per 100 pounds is added to the rate East of Montreal."

MR. EVANS: It should be west of Montreal. You add the arbitrary to the rate west of Montreal.

These arbitraries are exactly the same thing in principle as a local rate from the Maritime Provinces to Montreal except this -- that they are only operative as a part of a through rate and they are very much lower than would be the local rate for the mileage to Montreal.

The Maritimes contend that these arbitraries should not be subject to increase. The same principle in my submission applies to these arbitraries as to the matter of making horizontal increases on long haul rates but they point up the matter rather clearly. The distances from Montreal to Saint John and Halifax are about 400 miles and 800 miles respectively. In the event of an increase in the cost of transportation which is the reason for an increase in rates, it could scarcely be contended that the haul between Montreal and the Maritimes does not also involve increases in cost. It is therefore quite clearly an addition to the Maritime subsidy if, despite an increase in the cost of operation, no increase is made in these arbitraries.

I pass now to a consideration of the position in the United States.

There has been much misunderstanding of the history of the exceptions to percentage increases which appear in the judgments of the Interstate Commerce Commission. Mr. Smith has filed with your Commission an estimate showing the dollar revenue received from traffic involved in the so-called exceptions as compared with the total dollar revenue received by United States railroads from all traffic. His statement purports to show that the exceptions affect more than half of the total traffic. I do not pause to examine this statement in detail but I point out that many of the so-called exceptions are not exceptions from horizontal increases. They are merely exceptions in the sense that they apply different percentage increases in respect of some commodities than they do in others. Since the point of contention is whether relief should be granted against horizontal percentage increases, it cannot be argued that a differing horizontal percentage increase is truly an exception.

Moreover, there is included in the statement a very large amount of revenue from coal. Quite obviously, this must be discarded from the comparison with the Canadian position since in Canada, coal is also subject, as it is in the United States, to flat increases in cents per ton. The net result of eliminating these "exceptions" for comparative purposes is a reduction of more than \$2 billion in the "exceptions".

However that may be, the position in the United States is a very different one than in Canada and with all respect to our provincial friends, my submission is that they have completely misconceived the reason for these exceptions being made.

Before I turn to the cases, I should like to refer the Commission to Messrs. Dearing and Owen at p. 299. At that page in quite another context one finds a statement giving the reasons for excepting certain products of agriculture from the full burden of general percentage increases. The quotation there extracted is from the evidence of a railway traffic witness in Ex Parte 166. This is the statement:

"With respect to cotton, the originating railroads deemed it necessary to preserve origin relationships. This together with truck and water competition made it expedient to propose a maximum of 10 cents per 100 pounds. On fresh fruits and vegetables a maximum of 20 cents per 100 pounds is proposed in order to preserve relationships from the main producing areas to the chief consuming markets in eastern territory. There is keen competition among the various growers. Competition from other forms of transportation, particularly truck, was another factor that had considerable influence. Notwithstanding their desire to

apply the general increases the railroads chiefly concerned with this traffic are firmly of the conviction that they could not consistently propose anything higher than the maximum suggested."

It will be noted that in regard to cotton the statement is made that "the originating railroads deemed it necessary to preserve origin relationships." This is a point which I have mentioned from time to time before the Board and to your Commission, namely, that the originating railroads are usually quite different at different producing centres. It is in their interest, therefore, to promote the business of producers on their line as compared with the producers on other lines at the common market. They have, therefore, every incentive to apply increases of the type suggested by the provinces in this proceedings. That is to say, if a producer is 1000 miles from a market and another producer is 1500 miles from the same market, the railroad serving the more distant producer will have every incentive to ensure that the more distant producer has no greater increase in cents per hundred pounds than his nearer competitor who is served by another railway.

The second point which appears in the quotation from Dearing and Owen is that truck and water competition has affected the decision of the railways to apply maximum rather than flat percentage increases.

In dealing with fruits and vegetables, reference is made to keen competition among the various growers and to the competition from other forms of transportation as having considerable influence in the matter.

It is also significant that the railroads had a desire "to apply the general increases".

The situation in Canada is quite different. The two main railway systems in Canada usually serve all of the various areas. It is therefore not to the same extent in their interest to say that one area more distant than another is entitled to compete with the producing area closer to the market nor is it necessary to obtain traffic for its line that it should ensure that the more distant producer gets into the market at no greater increase in rates than the nearer producer. In these circumstances the Canadian railways have not themselves promoted the idea of exceptions to horizontal percentage increases.

The situation is quite different in the United States.

I have reproduced in the following pages and I do not intend to read them all, but I want to run them down just a little bit, some of the early decisions on this question.

The first and I think one of the most important decisions is in the so-called 40% case in 1920, and I give extracts.

THE CHAIRMAN: What is this?

MR. EVANS: Page 91.

THE CHAIRMAN: That is at page 91?

MR. EVANS: Yes.

THE CHAIRMAN: The year is 1920?

MR. EVANS: The year is 1920. That is in the so-called 40% case. We had an increase of 40% in this country at the same time. The first reference is to page 239 where they show that the application was for a general increase.

RE HORIZONTAL INCREASE

Extracts from Ex Parte 74, 58 I.C.C. 220

P. 239 - "Extent and Method of obtaining Needed Additional Revenue"

As above noted, in the original applications the carriers proposed to obtain the desired additional revenue by general percentage increases in the respective groups, applicable to freight traffic only."

Then I should like to read the quotation on page 243.

P. 243 - "Percentage Increases versus Flat Increases and Maintenance of Differentials and Relationships

Many shippers have directed their testimony and argument principally to the method of increasing the rates rather than to the amount of the increases. Shippers are far from unanimous in their views --"

You will bear in mind that this is an application for a flat increase, not for exceptions.

-- and may be divided into three groups: (a) those who seek the preservation of existing relationships and differentials either by specific or flat increases or by applying the percentage increase to base rates and employing in connection therewith differentials from and to other points; (b) those who advocate a percentage advance in all instances, contending that differentials should increase in the same ratio as all other rates and charges; and (c) those who advocate a percentage increase with a maximum."

I ask the Commission to observe this:

P. 244 "It is evident that there are many competitive situations where no recognized differentials--"

THE CHAIRMAN: Before you go on, you had better tell me here what is meant by the expression "competitive situations". Does that mean as between railways or as between localities?

MR. EVANS: No; industries.

THE CHAIRMAN: As between industries.

MR. EVANS: And producers.

P. 244

"It is evident that there are many competitive situations where no recognized differentials have ever existed but where, nevertheless, the rates have been made to reflect competitive conditions. Such situations greatly outnumber those where 'fixed relationships' have been established."

He is talking there about the establishment of rate relationships and they differentiate between that and what our friends have called "relationships".

"In favor of maintaining differentials, it is said that they have been fixed in most cases after careful investigation, and that they represent the proper measure of differences in the rates; that often they represent the maximum differences which will permit more distant shippers to compete with those in close proximity; that to increase rates by a percentage tends to decrease the radius in which goods are marketed, and thus by lessening competition prices are advanced; and that in all cases the margin of profit has not increased proportionately to prices."

Then on the next page:

P. 245 "Those who oppose maintaining differentials at this time contend that the value of the dollar expressed in terms of commodities shipped to-day is in reality but one-half its former value, and, therefore, a differential which was fixed at a given amount several years ago should, to have the same economic effect, be greater to-day; that there have been general increases in the prices of practically all commodities, in wages and in the charges for nearly all services, and that differentials should not be made an exception to the rule; and that as increased operating costs are the underlying reason for the proposed increased rates, the additional service represented by the differential, being more expensive

than heretofore, should pay greater rates as well as other services."

(Page 23308 follows).

Now, we had there before the Commission on an application for a general increase, groups of people contending one way or another, some contending, as we have contended here, that these percentage increases are proper, and others contending that they are not.

Now, I am going to read this little paragraph for quite another reason:-

P. 245 - Dealing with specific increases and after stating that the carriers almost uniformly oppose this method, it is stated that "it is not generally advocated by shippers. Further, the difficulty of its adoption is apparent because of the lack of reliable statistics from which to determine the probable additional revenue from a given increase. "

That kind of thing was exactly what the Board said in the 21% Case, but I want to point out, just as the Board did, that the lack of reliable statistics had to do with calculating the additional revenue and had nothing whatever to do with determining where this long-haul maximum would apply. I am saying this to the Commission, that the lack of reliable statistics can never be made good except ^{by} the kind of way bill study the Board is doing today, and that has taken them nearly two years to get one study done covering five test days. Now then, it is not a lack of statistics such as a Commission or Board should have; it is something that you just cannot have and keep up to date.

But my point about this is that the Commission refused to give effect to contentions of this kind because they said they could not say what revenue results would be achieved by certain alternatives to a general percentage increase. Now, it is a very different thing when the railways

themselves, after having made studies, come along and propose exceptions.

THE CHAIRMAN: That term "specific increase", does that mean the kind of increase that is on coal for instance?

MR. EVANS: Yes.

"Without attempting to pass finally upon the question whether in given cases differentials should or should not be maintained, it is evident that no general program of maintaining differentials can be made effective coincident with the increases here approved without materially delaying their effective date as definite testimony covering individual situations is before us in only a very few cases. To maintain differentials by applying the percentage increases to basing rates and adding thereto existing differentials cannot be done without materially lessening the amount of additional revenue to be derived by the carriers as generally differentials are added to rather than deducted from base rates.

"After carefully considering the situation we find that with the exceptions hereinafter noted general percentage increases made to fit the needs of the groups of lines serving each of the four groups must be considered for present purposes the most practicable."

At page 247 the rates on individual commodities were given consideration. In the opening portion (see p. 248) the following statement appears:-

"Our general conclusions as to the impracticability of specific increases or of attempting now to

maintain differentials dispose of a number of these contentions. It should also be said that while we do not here sanction specific increases in lieu of percentages, we are not to be understood as expressing disapproval of increases of that character made by the Director General."

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P. 248 - Coal - The proposals of the carriers on this commodity were approved.

P. 249 - Lumber - "For the purposes of this report it is our opinion that the percentages hereinbefore approved should apply to this commodity."

Petroleum and its products - After reviewing the contentions in connection with this commodity, the following appears at p. 249:-

"It is concluded that no exception to the general percentage increases herein approved need at this time be made upon petroleum or its products. As has been observed in connection with other situations, the carriers should give careful consideration to the effect of the percentage increases approved on petroleum and, if necessity arises, should arrange for such modifications as the situation may seem to warrant."

P. 250 - Fruits and Vegetables - "It is concluded that no exceptions to the general percentage increases will now be made."

Sand, Gravel, Rock and Slag - "We are not convinced that exceptions should be made at this time from the percentages approved for traffic generally. However, the record does suggest that rates in eastern territory are out of proportion to those in the other groups. The carriers have indicated a willingness promptly to readjust rates in cases where hardship results from the general percentage increases, and their special attention is called to these commodities...."

P. 251 - Livestock and Packing House Products

"It is concluded that the facts before us at this time do not warrant any exception to the percentage method of increasing the rates on either livestock or packing-house products."

P. 252 Iron Ore

"It is concluded that at this time no increases should be made in the rates on iron ore from the Minnesota or Michigan ranges to Lake Superior or upper Lake Michigan ports. Other rates on iron ore may be increased according to the percentages herein approved."

Other Ores - "The evidence before us in this proceeding, however, does not warrant exceptions to the general percentage increases at this time."

P. 253 - Grain and Grain Products

"We find that the grain rates into and out of these markets may be increased by the general percentages herein approved, with the

understanding that the carriers will, within thirty days after the service of this report, file tariffs restoring the equalization through the grain markets now enjoying that basis."

P. 256 - Adjustments - "It is impracticable at this time to adjust all of the rates on individual commodities It is conceded by the carriers that readjustment will be necessary. It is expected that shippers will take these matters up in the first instance with the carriers, and the latter will be expected to deal promptly and effectively therewith, to the end that necessary readjustments may be made in as many instances as practicable without appeal to us."

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By the way, I should have said in passing that the Commission rejected all these requests for applying exceptions in that case in 1920. They did not have any increase on iron ore, but there were no exceptions otherwise made to the percentage increase, and there is a large number of commodities in respect of which these proposals were made as will be seen by the notes.

Following the 40% Case the first application for a general increase was one for a general increase of 15% which was submitted to the Commission in September of 1931 and decided on October 16, 1931, i.e., Ex Parte 103 reported in 178 I.C.C. 539.

This application, as the headnote indicates, was for waiver of rules covering the publication of

schedules so as to permit filing upon short notice of blanket supplements effecting a general increase in freight charges of 15%. The application was denied. The basis of the application was that the applicant railway companies were entitled to have rates increased so as to provide a fair return under the legislation as it then existed but which was later amended. The importance of this decision is quite unrelated to the question of fair return so far as my interest in it is concerned. At p. 578 the report (78 I.C.C.), having reviewed the circumstances under which the application was made, that is to say, the depressed conditions in industry and the unlikelihood that the increase sought would produce the additional revenue required, the Commission at p. 578 put forward the following suggestion (now, this is the genesis of the exceptions):-

"The further step which we are now about to propose is offered for the consideration of the railroad executives in the immediate emergency and only as a temporary measure of relief.

This plan is outlined in the appendix. It is designed to avoid imposing burdens on industry which cannot reasonably be borne under present conditions, to limit the danger of diversion of traffic to other forms of transportation, and to disturb business conditions as little as possible by preserving, very generally, existing rate relations.....

The increase is in cents per hundred pounds or amounts per car subject to a fixed percentage maximum limit.

I draw attention particularly to the underlined words,

which is my underlining:-

"The abnormal conditions now existing distinguish the situation from that before us, Increased rates, 1920, supra,....."

That is the case I have been first giving reference to, where they had gone along with the railways' application and had refused to make exceptions.

".....wherein we discussed the respective merits of percentage and flat increases. We propose to limit the increase to a period ending March 31, 1933."

They distinguished the abnormal conditions in the depression from those obtaining when they had previously rejected these requests for exceptions.

The increases authorized were mainly \$3.00 per car on coal, coke, minerals, pulp wood, lumber and the like, \$6.00 per car on iron, stone, petroleum, etc., and 1¢ per hundred pounds on fruits, and vegetables and the products of agriculture, petroleum products, brick, lime and a number of other commodities. All other commodities received increases of 2¢ per hundred pounds.

Your Commission will note that this was the beginning of exceptions to flat percentage increases. It was offered by the Commission in lieu of the application for flat percentage increases for consideration "in the immediate emergency and only as a temporary measure".

The Commission was at pains, as the quotation indicates, to distinguish its decision in the 40% Case in 1920, due to what the Commission called "the abnormal conditions now existing". The increases granted as a result of this decision were extended until September 30, 1933.

In 1935, in Ex Parte 115, 208 I.C.C. p. 4,

the railways again applied for a general increase.

In this case for the first time the railways applied for a general increase subject to certain exceptions.

Now, I quote from the Judgment saying that this kind of application is a departure from previous applications that have been made:-

Extract from Ex Parte No. 115,
208 I.C.C. 11

" APPLICANTS' PROPOSALS

"In the various general proceedings involving horizontal changes in the general rate level in the past two decades the issues have generally revolved around proposals to apply a uniform percentage increase or reduction to all rates. The present proposals depart from the uniform percentage plan. For the most part an increase of 10% in present rates is proposed, subject to certain maxima and exceptions, and some commodities would be subjected to increases of flat amounts instead of percentages, while others would be exempted from any increases, and in still other instances increases are proposed only for the longer hauls beyond what applicants believe to be the zone of the most acute truck competition. There are also numerous proposed territorial exceptions, principally in mountain-Pacific territory."

The result in this case was that the application for an increase of 15% subject to certain maxima and exceptions was refused and in lieu thereof, further emergency rates having somewhat different application

than those previously authorized and which had then expired, were allowed.

P. 58: "Upon the evidence it is our conclusion that the increases proposed, considered as a whole, many of which by their nature may be established only by incorporation into the existing rate structure, would in many individual cases increase revenues, if at all, only temporarily; that many such increases would result in undue prejudice and preference as between different classes of traffic and as between different communities and shippers; that in many instances the proposals would result in distortion of relations prescribed by us....; that the ultimate effect of establishing the proposed rates as a whole would probably be to harm rather than help the railroads....; and that the proposals would increase the rates upon certain kinds of traffic above a just and reasonable level. This latter conclusion applies particularly to certain products of agriculture, to livestock, and to certain products of forests.

"As a temporary measure, for the immediate alleviation of the more acute financial distress of the railroads, however, it is not so clear that the results of a carefully selected, moderate increase would be adverse...."

There were several further hearings in this case (Ex Parte 115) and some modification in the Judgments but the result was unchanged in principle. In the first of these hearings a continuation of the emergency charges was refused and in the second (219 I.C.C. 565) a

continuation was again refused. The matter was re-opened (223 I.C.C. 657) and certain increases on heavy basis commodities were permitted. This was known as the "General Commodity Rate Increases Case, 1937".

In Ex Parte 123 (1937-38) an application was made for a 15% increase in all freight rates (226 I.C.C. 41).

At page 46 it is clear that the application in this case was for a 15% increase subject to certain exceptions as well as for an increase in passenger fares. It is to be noted (see p. 48) that the application included increases in the commodities which had been increased in the General Commodity Rate Increases Case in 1937. This is important in view of the later decision on this application because it was held that the increase ordered in Ex Parte 123 should not be added to the increase in the General Commodity Rate Increases Case, (see p. 139) where it is provided that these prior increases "shall be taken into account and shall be considered as part of the increases here authorized so that the above mentioned percentage increases shall not be made cumulative thereon."

On p. 76 reference is made to the protests as to the flat horizontal increase.

THE CHAIRMAN: Before you begin that, who were "they" -- "They therefore"?

MR. EVANS: There were a large number of industries. I have not had time really to go into all this in detail but I can give you an example of who they were by reference to the notes in the - -

THE CHAIRMAN: Were they what you might call long-haul people?

MR. EVANS: Yes, some of them, but mainly industries, and the industries divided in themselves: the long-haul ones wanted the flat increases, and the short-haul wanted percentage increases.

THE CHAIRMAN: I see, all right.

MR. EVANS: There were a large number of increases though. I am now going to read these extracts from the Judgment of the Commission in 266 I.C.C. p. 76:-

"They" (referring to these protestants)
"therefore ask that we limit the amount of any increases by making the increases in flat amounts per unit transported or by imposing a maximum amount upon any percentage or graded increases. There is a diversity of views, with which we have long since become familiar, between the long-haul shipper who fears a percentage increase will drive him out of business and asks for stated or 'flat' increases, and his short-distance competitor who demands the benefit of his location and insists that the only equitable basis is one which imposes increased costs ratably with increased distance of movement."

(Page 23319 follows)

An investigation of this character is a poor vehicle for the adjustment of individual rates or for the elimination of any preferences and prejudices except those which may be outstanding....."

That, I may say, is almost exactly what the Board said in the 21% Case.

"To devote the necessary time to a present consideration of such matters would nullify the purpose of this investigation. But we do consider all facts presented which are relevant under the act and which bear upon the reasonableness of the great bodies of rates proposed to be increased."

Now, I can pass the balance of that bit, although I desire it taken in, and also nearly all of page 98. The Commission will see, however, that in that decision the percentage increases were granted, subject only to what is said in the paragraph near the bottom of page 98:

"It is to be noted that these percentage increases were added to the rates prior to the increases made in 1937 and also 'the increases authorized may not reasonably exceed the specific maxima originally proposed by the applicants to be applied upon lumber, sugar, fruits and vegetables.'"

(Portion to be taken into record follows):

As to specific rates, proposals were made by protesting parties to make exceptions. In the case of the class rates (see p. 80) it is proposed that the increase would be subject to a maximum of 15¢ per hundred pounds.

"They contend that otherwise long-haul traffic from and to New England will be unduly penalized."

It also appears on this page that some of the Midwest official bodies "have urged that the general body

of rates in portions of western trunk-line territory is excessive."

On p. 81 the finding of the Commission is as follows:

"No sufficient reason appears of record why, if any general increases are to be made, class rates should be exempted, or why the class rates in any particular territory should not be advanced equally with those in other territories and between one territory and another. This determination, however, must carry with it the reservation that if, in any other proceeding, the propriety of different treatment is established, this particular finding shall not prejudice any future readjustment...."

It is interesting to note (see p. 92) that the Secretary of Agriculture suggested that rates should rise and fall with prices.

The conclusions may be summarized as follows:- (see p. 136).

An increase of 15 percent, generally based upon a normal volume of traffic, was too much. It was held that certain rates were then below levels already approved as reasonable and could be increased and a lesser general increase allowed on all traffic. At the top of p. 137 the following is stated:-

"The present attempt to allocate the necessary increased revenue in flat amounts to be added to existing rates would be hazardous in its possible revenue results, and would unduly ignore the element of distance as a measure of cost."

Further down on the page (p. 137) the following statement is made:-

"We conclude that the increases which were

accomplished immediately before the end of the year 1936 in transcontinental rates; the flat increases made upon cotton...; those made effective early in the year 1937...; and others referred to, should be considered as part and parcel of the matter we are now considering."

P. 138:

"We therefore find and conclude that the proposals before us have not been justified, as a whole, but have been justified to the following extent.

All existing rates and charges, including those for accessorial services other than protective service against heat or cold, upon the date of this decision, including those found or prescribed by us as reasonable and not yet effective, may be increased, and as increased may be maintained....by 10 percent, except the rates on products of agriculture other than tropical fruits; except the rates on animals and products and the products thereof and articles taking the same rates, horses and mules not being included in this exception; and except lumber, shingles, and lath, and articles taking lumber rates; and except the rates on cottonseed oil and vegetable oils, other than linseed oil; as to all of which excepted groups of commodities the increase in rates may be 5 percent; and except anthracite, which may be increased 10 cents per ton."

It is to be noted that these percentage increases were added to the rates prior to the increases made in 1937 and also "the increases authorized may not reasonably exceed the specific maxima originally proposed by the applicants to be applied upon lumber, sugar, fruits and vegetables."

MR EVANS: Then I refer next to Ex Parte 148, 248 I.C.C. 545 at 572. We have been dealing up till now with the depression period, and this is the first case after the depression period. This was decided in 1943.

THE CHAIRMAN: Is that the case at the foot of page 98?

MR EVANS: Yes. It was decided in the year 1943. I am not going to do more than just make short references to that.

THE CHAIRMAN: Well, that was during the war, then.

MR EVANS: That was during the war.

P. 581. The cotton interests opposed any increases in rates on cotton.

The judgment says:

"If an increase is authorized, they request" -- speaking of the cotton interests --

"recognition of the highly sensitive competitive relation between rates on this commodity and that existing relations be preserved. The Dallas interests urge that any increase be in cents per 100 pounds rather than by percentage. This is directly contrary to the position taken by the New Orleans, La., cotton interests, who do not oppose a reasonable increase in cotton rates provided it is on a percentage basis and not in cents per 100 pounds."

That is just another illustration of where you had two interests opposed on that same question.

The judgment allowed a percentage increase of 3% on cotton.

THE CHAIRMAN: Which of those two interests was nearer---

MR EVANS: Well, the long haul interest must be the Dallas one, and the short haul must be New Orleans. In

the result they allowed a 3 per cent increase on cotton in that case.

Similarly, the lumber interests differed in their views, the long-haul producers insisting on maxima and the short-haul producers favouring uniform percentage increases.

In the case of canned goods (see p. 603) the controversy is stated to be "in essence between the long-haul shippers, who favour specific amounts of increase per 100 pounds, and the short-haul shippers, who claim the advantages of a percentage method of increasing rates.

On behalf of the Evaporated Milk Association... the view was expressed that any increase approved be upon a percentage basis, with no maximum limit... This industry takes the position that whatever percentage is authorized should be uniformly applied to all traffic without exception."

The increases authorized were 6% subject to exceptions in the case of listed commodities which received increases of 3%. Coal had varying maxima in cents per ton and iron had no increase whatever.

Note that in this case, apart from smaller percentage increases than those applied for and different percentages to certain groups, no exceptions to the percentage increase other than those proposed by the carriers were adopted.

It will be noted from these extracts that in Ex Parte 74 which was the 40% Case in 1920, the Commission referred to the fact that the railways proposed "to obtain the desired additional revenue by general percentage increases".

Your Commission will also note that despite contentions made by a number of industries, percentage

increases were uniformly applied.

It is clear from the decision in Ex Parte 103 -- that is the one in 1931 -- to which I have referred that the origin of exceptions was not one imposed on the railways but one almost diffidently suggested by the Commission in lieu of the increase applied for as an emergency and temporary measure because the Commission found that in the depressed condition in which industry found itself in that year it was doubtful whether the railways would achieve the desired increase in revenue if their application should be granted.

Your Commission will also observe that in Ex Parte 115 which was decided in 1935, the depression was still in existence and the judgment at p. 11 of 208 I.C.C. makes it clear that, unlike the applications made in the previous 20 years, the proposals of the railways departed from the "uniform percentage plan". Your Commission will have noticed also that this judgment was issued in respect of an application filed in the early 1930's which was a period of depression and not inflation.

It will have been apparent to your Commission that it was during this period that not only were prices on a decline and railway traffic at a low level but motor competition made great strides and had become a serious threat. The fact is that in these circumstances the railways, fighting for business among themselves, fighting to promote total traffic, and fighting a new form of carrier competition, decided to establish the principle of making exceptions to horizontal percentage increases.

What happened in those years has been continued into the postwar years and whatever may be said about the decisions of the Commission on this point, an analysis of them, which I have not at the moment time to make, will

disclose that these exceptions were largely proposals by the railway companies themselves.

Now, I had our traffic people look at the last one, Ex Parte 168, and I find that there were twenty-three groups asking for exceptions, and the only exceptions were the five contained in the application of the railways themselves. I have not had a chance to make a similar analysis of the other judgments, but I thought that was important. In the very last case exceptions were granted in five groups of commodities, and there were twenty-three groups seeking exceptions.

THE CHAIRMAN: Is that last case given here?

MR EVANS: We have had a number of references to it. It is 276 I.C.C., page 9, Ex Parte 168.

THE CHAIRMAN: What year?

MR EVANS: That would be in 1949, the final judgment, I think August of last year.

THE CHAIRMAN: 276 I.C.C., and Ex Parte what?

MR EVANS: 168.

My only point about that is that the railways themselves put in five groups of commodities for exception, and they were the only exceptions granted by the Commission, in spite of the fact that twenty-three groups were asking for exceptions.

THE CHAIRMAN: That would be shippers?

MR EVANS: Yes.

Your Commission will also have noticed that Mr. Smith's exhibit -- I am sorry, I must have missed something here. I am speaking of Mr. Smith's Exhibit 266, where he listed the revenue value of the commodities, railway revenue value of the commodities, subject to the exceptions. Mr. Smith's exhibit has selected one of two of the recent decisions in which a large number of exceptions were made.

In at least two of the last four increase cases there were very few exceptions. Whatever may have been the reason for this lack of uniformity in the decisions, my submission is that without a full knowledge of all the facts it would be impossible to assess them. There is one thing clear, I think, that on the face of it the exceptions largely originated with the railways and concerned themselves with quite different factors than are met with in Canada today.

Mr. Smith in his argument referred to the estimates contained in Exhibit 266 showing the extent of exceptions in Ex Parte 162. He stated that of a total revenue of approximately \$7½ billion about \$4-3/4 billion was revenue from traffic which was the subject of so-called "exceptions".

Your Commission will note that Mr. Smith's first category, that is to say, commodities receiving less than what he called the standard percentage increase accounted for approximately \$750 million and that another \$1,200 million represented revenue on coal and coke which had a flat increase in cents per hundred pounds. It is thus apparent that approximately \$2 billion of the \$4-3/4 billion represented either lesser percentage increases or a flat increase on coal and coke corresponding to exceptions already made in this country. Thus nearly one-half of the so-called exceptions can be eliminated in order that a fair comparison be made for the purpose of contrasting the results of judgments in Canada with those of the I.C.C.

THE CHAIRMAN: We will adjourn now.

---The Commission adjourned at 1:00 p.m., to meet again at 2:45 p.m.

Mr. Evans
Ottawa, Ontario,
Friday, May 19, 1950

AFTERNOON SESSION

THE CHAIRMAN: Very well.

MR. EVANS: At the adjournment I had reached the top of page 102 of my notes. I am about to begin at the very top of the page. I had been speaking about the extent to which the exceptions put out in Mr. Smith's exhibit 266 were true exceptions.

It is not a true exception to except commodities receiving a lesser percentage increase and one cannot add in coal and coke in the United States without also bearing in mind that such commodities are also excepted in Canada.

Mr. Smith, in referring to the judgment of the Board of Transport Commissioners in the 21% case, referred to the judgment at page 65. He did not, however, refer to the entire judgment on this subject which begins at page 46.

THE CHAIRMAN: Pardon me a moment.

MR. EVANS: Page 46.

THE CHAIRMAN: We will have it in a moment.

MR. EVANS: I am not going to refer to it in detail.

THE CHAIRMAN: The 21% --

MR. EVANS: The 21% judgment. That is March 30, 1948. Your lordship will see at page 46 the subject of straight percentage increase and is discussed; at page 47 discrimination - mileage comparisons. There is a general discussion of discrimination. Then on page 51 competitive rates, page 52 rates to assist and develop industry, page 55 export and import rates, and page 57 mountain or Pacific scale of rates. At the bottom of page 57 the subject of so-called competitive rate relationships is discussed, and that goes on to the foot of page 58 where a new paragraph

begins, "equalization of rates". You can see the extent to which the Board dealt with all these various rate questions in this revenue case. It is not until you get to page 65 that you find Mr. Smith's reference about percentage increases. In particular, he did not refer to the judgment at pages 57 and 58 where the matter of competitive rate relationships was being discussed.

Your Commission will note that the heading which begins the discussion of this subject is "so-called competitive raterelationships".

On page 58 of the judgment a table of rates is shown which indicates the difference between the rates on different dates when various increases and decreases were made. In the paragraph following the differences and the effect on these differences as a result of an increase in rates are discussed and the subject is concluded with the following statement:-

"These rate differences as such resulted from the rate increases and reductions made"--

THE CHAIRMAN: That is the paragraph following in the judgment.

MR. EVANS: You will see that at the very end of the subject, at the foot of page 58, after the table.

"These rate differences as such : resulted from the rate increases and reductions made and certainly cannot be properly described as competitive rate relationships."

In my submission it is one thing to describe rate differences as rate relationships and quite another to establish that they are in fact rate relationships. One could, by pointing to any differences in rates which existed as a result of differences in mileage, call such a

difference a rate relationship which would be disturbed by a percentage increase. It is manifestly impossible to have any increase in rates which would not change these differences. The extreme case, of course, is the case that was mentioned during these proceedings and which occurred in the evidence of Mr. Braidwood in the 21% case. There is a reference in the transcript already to this. The flat question was put to him whether, if there was a shipper in Oakville shipping to the Toronto market and the increase in his rate was 3 cents, he would expect the same maximum to apply to his goods shipped to the Toronto market from Vancouver, and he said, if I recall his words correctly, "If that is the way it is that is the way we want it." In other words, he had no limit on the extent to which he would go in saying that he should have the benefit of no greater increase because of his longer haul than the man in Oakville.

(Page 23330 follows)

The respondent provinces continued their attack on horizontal percentage increases throughout the various hearings before the Board. They argued there just as they have argued here as to the position taken in the I.C.C. judgments. Their complaint here is that the Board has decided against them on the merits and they are now asking your Commission to do something about it.

Your Commission will observe that they do not ask your Commission to recommend legislation prohibiting horizontal increases because this would be impractical. Rather they are seeking to obtain from your Commission a recommendation or an opinion such as was given by the Duncan Commission upon which they can support their argument before the Board of Transport Commissioners.

I am not saying that a case cannot be made out in some instances for relief from a horizontal percentage increase, but I am saying that the Board invited those who might be in a position of difficulty to bring their cases individually to the Board for discussion. See page 65 of the Judgment in the 21% Case --

"While there are a number of individual cases where discrimination in rates is alleged to exist and it may be that some of these require special and separate consideration, on another occasion. But they do not seem to be so outstanding as to require separate treatment in a case of this nature."

Mr. Smith in his argument left with your Commission the impression that the failure of the Board to deal with their position satisfactorily was largely because of the tendency of the Board to decide issues only upon evidence before it and because of the lack of adequate traffic statistics. (p.22240). This is not so. The Board made it clear by its judgment that it did not consider that rate differences as such were in reality competitive rate

relationships. Having decided this, much of the Respondents' case fell to the ground.

Moreover, the Board made it clear that in special cases where hardship could be shown, the matter was open for further consideration and that the matters involved were not sufficiently impressive to warrant taking the necessary time in a revenue case. This is a very different attitude than Mr. Smith would have your Commission understand to be the case. As for the lack of traffic statistics, no one could produce these. They do not exist and can only be obtained through a waybill study. The lack of traffic statistics is referable only to the difficulty of estimating the revenue results of a given increase. The fact is that the Board has held that a revenue case is not 'a proper place to deal with the few cases where a percentage increase would cause hardship. What the Board lacks, if anything, is proof that real hardship is being experienced. Moreover, no one has advanced any principle on which the Board could proceed.

THE CHAIRMAN: You mean no one before us?

MR. EVANS: No one before the Board and no one before you, sir. They take a rate from A to B and compare it with the rate from C to B, and there is a difference which they call a relationship. There has been no such principle established anywhere as a basis for awarding a maximum.

It would, in my submission, be folly to impose upon the Board of Transport Commissioners any direction by statute or otherwise which would curb the discretion of the Board in this matter. To do so would create a chaotic condition which might require an almost immediate statutory remedy. I need only suggest to your Commission that if the

inflationary cycle which we have just been passing through had gone to the point where costs had become ten times as great as they were before the war and prices had increased proportionately, it would be quite impossible to operate a railway company without recognizing that the cost of transportation for the longer hauls had also increased.

My submission is that this matter of horizontal increases is a matter for the discretion of the Board and that discretion could not possibly be exercised fairly and properly to all concerned without a full knowledge of circumstances and facts which could only relate to the problem of the moment when an application is made.

I might interject there. The suggestion was seriously made here that the Board should anticipate that some people might have complaints. As a practical matter I say to the Commission that it sounds fine, but when you are dealing with literally hundreds of thousands of people who have small stakes and big stakes it would be an impossibility for the Board to initiate inquiries among all those people. Then again I think Mr. Smith said that the railways were given the onus by the Interstate Commerce Commission to do that very thing. Of course that impression is quite wrong. They were given an onus but no one ever suggested that the railways were only to act on their own initiative. It was expected, of course, that the shippers would come to the railways and lay their complaints before them. That is something that has never been forbidden in this country so far as I know. Certainly as far as my company is concerned they hear complaints from shippers all the time and they deal with them, and they are quite capable of dealing with them.

My submission is that this matter of horizontal increases is a matter for the discretion of the Board and

that discretion could not possibly be exercised fairly and properly to all concerned without a full knowledge of circumstances and facts which could only relate to the problem of the moment when an application is made. Moreover, I remind your Commission that the Board has a general inquiry under way in which this question is to be gone into. The matter is much too complex to generalize and must inevitably be left to the Board of Transport Commissioners. I further submit, in summary on this point, that exceptions to horizontal increases are in reality a subsidy to the long haul producer; that subsidies of this kind are particularly bad; and that those who would be affected most have not been before your Commission to express their views.

I have not had time to analyze adequately the amendments proposed by Mr. Smith. He handed these in on Thursday of last week. I venture to suggest, however, that it will add nothing but confusion to proceedings before the Board. Taking the clauses individually, the Board is by Clause(b) -- I am now looking at Clause (b) of 325. That is not in our consolidation. We did not get it in time.

THE CHAIRMAN: What page in your consolidation?

MR. EVANS: We have not got it in our consolidation. We didn't have it in time.

THE CHAIRMAN: Section 325.

MR. EVANS: Mr. Smith's amendment, which is on thin onion skin paper, handed in during his argument.

THE CHAIRMAN: What is it?

MR. EVANS: I was just going to argue to that if you have it before you. Taking the clauses individually, the Board is by Clause (b) to give due consideration, among other things, to the "effect of rates on the movement of traffic"; to the effect of rates in "disturbing rate relations"--

THE CHAIRMAN: Wasn't that altered to read, "to the effect of rate changes"?

MR. EVANS: That may be so. It doesn't make any difference to my argument. I am just summarizing it. The Board is to give consideration to the "effect of rates on the movement of traffic"; to the effect of rate changes in "disturbing rate relations"; and to the necessity for "the maintenance of adequate and efficient railway transportation services at the lowest cost".

One is struck by the fact that the duty to consider the effect on the movement of traffic is something which it is unnecessary for the Board to take into account because that is obviously one of the first considerations of the railways in their own interest. As to the effect of rates in "disturbing rate relations" - this amendment rather suggests that something is being disturbed but what constitutes rate relations which are being disturbed is not described.

THE CHAIRMAN: Pardon me a moment. I think we could follow this much better if we had a copy of the proposed amendment before us. Mr. Smith handed it in?

MR. EVANS: Yes.

(Page 23335 follows)

MR. EVANS: That is to say, there is an assumption in that first subparagraph that something is being disturbed.

THE CHAIRMAN: That is in (b).

MR. EVANS: Yes. It assumes that some disturbance is being created. Now, you are left in doubt as to what is being disturbed, because nobody defines rate relations, and you have nothing to indicate what is causing the disturbance except that it seems to be assumed that rate changes disturb something. Now, to me that is bad legislation.

THE CHAIRMAN: Did Mr. Smith not offer an explanation of the term "rate relationships" or "rate relations"?

MR. EVANS: Well, I think there was some discussion, but I thought we had agreed that what he was talking about was rate relationships. No one has precisely defined what constitutes a rate relationship, and my point about the judgment of the Board in the 21% Case was that the Board made quite clear that what the provincial counsel had been talking about as rate relationships are not rate relationships at all; they are talking about rate differences.

THE CHAIRMAN: Well, does it not perhaps come back to that same objection to the horizontal increases?

MR. EVANS: This is what I am speaking to; this is horizontal increases.

THE CHAIRMAN: That is, that the percentage increase changes the dollar and cent increase.

MR. EVANS: Yes.

THE CHAIRMAN: Or relation.

MR. EVANS: They are speaking there of differences and not rate relationships. This legislation is bad, I say, because of two things. It assumes that something is being disturbed. That is a sort of prejudging in

legislation, that some change has had an effect of disturbing something, and then when you come to find what it is disturbing, they use the word "rate relations", and that is something that has never been defined anywhere.

THE CHAIRMAN: That is what I think. At the time, at first blush I thought they really meant trade relationships.

MR. EVANS: Well, if it was intended to include commercial relations or trade relations, then all you would have got is an economic planning board.

THE CHAIRMAN: Well, I know, that is what I thought, that is exactly what I thought was being asked for.

MR. EVANS: My suggestion in sum total - and I am going to deal with these three subsections - is that that shows how utterly hopeless it is to do what they are trying to do. You see, they will not go so far^{as} to prohibit by legislation horizontal percentage increases, because they realize that is impractical, so what they have got is some direction to the Board, a compulsory duty on the Board to do something about rate changes that disturb something. Now, in the end result I am going to suggest to the Commission that it is going to be for the Board to say what is being disturbed and therefore what are rate relationships, and it is going to be also for the Board in the end to say whether they are in fact disturbed. Now, they have got those powers, and they have exercised those powers today. All you have done is clutter up the language of the statute with a lot of really meaningless things, because, unwilling to prohibit that which they object to because it is impractical, they seek to substitute a lot of language that only creates legal problems for the Board and for the courts.

In view of the decision of the Board in the 21% Case, the kind of things the Provinces are arguing for have been determined not to constitute rate relationships.

As to sub-clause (c), the Board on application of anyone interested is required to change and alter rates in such a manner as it may consider necessary or expedient - and then I quote the words of the subsection - "in order to restore rate relations which it may find to have been unduly disturbed".

Now, let me just give you an example of what might happen. Let us suppose that the Board should find that the rate relation was the kind of thing they call rate relation, and it was really a rate difference, and having found that those relationships exist, subparagraph (c) requires them to restore that which they have found to be unduly disturbed.

Now, subsection (c) has a retroactive effect back to and including the 21% increase, and the Board is then required to restore relations which it found to exist prior to the 21% increase. Now, that, in my humble submission, even apart from the criticism I made of (b), is an attempt to require the Board to deal retroactively in a different way with something it has already dealt with in its judgment, and to my mind it is the essence of bad legislation.

This is an attempt to make a retroactive adjustment of increases including the 21% increase and until the problem covered by clause (b) has been solved as to what constitute rate relations and as to whether they have been disturbed, the Board could not function under clause (c).

Under Clause (d) the Board is to give due consideration, among other things, to the changes in import and export rates "in disrupting relations between Canadian ocean ports" and the Board is directed to inquire retroactively into import and export rates and to change and alter them as it may consider necessary to restore the relationships which may have been disturbed.

Now, I suggest that a court looking at that would assume that what had happened since the 27th of March, 1938, the date in (d), must be considered by the Legislature to have disturbed those relationships, and therefore the interpretation to be put on that legislation would be, that the Legislature apparently thought the disturbance had been created and the Board had to do something about it.

Now, the matter of port relations is complicated, but to attempt to do now something to make up for what I call retroactive disturbances is to my mind the essence of bad legislation.

Your Commission will observe that even Mr. Smith, the most violent objector to horizontal increases, has not in his proposed legislation attempted to prohibit horizontal increases.

Moreover, as drawn, the legislation is almost hopelessly vague and difficult to interpret.

A further difficulty with this draft legislation is that it rather suggests that the Board must take as *prima facie* proved that there has, in fact, been a disturbance of rate relations. This, in view of the fact that legislation is to be interpreted as remedial, will certainly raise difficult and almost insoluble questions for the Board. One would have no doubt that the Board in the face of such legislation would feel compelled to assume that rate relations which are not described, have in fact been disturbed.

A further difficulty which I have not time at the moment to enlarge upon is the attempt to have the Board assume that there has been a disturbance in the relationships between Canadian ports since 1938. The matter of port relationships is largely one involving not only

Canadian but United States ports and it is a most difficult and complicated matter.

THE CHAIRMAN: I think I asked Mr. Smith what ports he had in mind in this proposed amendment, and he said Montreal as opposed to Saint John and Halifax.

MR. EVANS: Yes, but the import and export rates through Saint John and Halifax as well as the import and export rates through Montreal are tied to the port rates in the United States.

THE CHAIRMAN: We know that.

MR. EVANS: Now, once you disturb those relationships you involve immediately relationships with the United States roads through their ports, and if you do that, then you can have all kinds of complications. It is a matter of great importance to the United States roads to see that their port relationships with our ports are not affected, because obviously if the shipper in the United States can ship through our ports more cheaply than through the United States ports, the United States roads lose the haul on it.

Now, there is one thing in which we have an advantage and one thing in which the Maritimes have a definite advantage, that, notwithstanding that their mileage from the industrial centres is much greater than the American ports, yet they have a substantial parity with those ports. Now, if you are going to go into a war with the United States roads, quite obviously the advantage which the Maritime ports now have is going to be challenged, and it is a thing that this country and the Board of Transport Commissioners cannot deal with without having in mind the relationships with the American ports.

THE CHAIRMAN: Well, I think that Mr. Smith had in mind that certain changes could be made in the relationships, to use that word, between Montreal and Saint John and

Halifax without disturbing the United States relationships.

MR. EVANS: If you do that, then the rates to Montreal, subject only to the application of the domestic rates as a maximum, are related in turn to the United States ports. Now, if you are going to disturb those two relationships, whatever you do disturbs the relationships with the United States ports. If they are both related to the United States ports that must be so. But, as I say, it is a very complicated business, it was not developed before this Commission, and certainly I suggest that it is something that the Board of Transport Commissioners alone in its wide discretion should deal with, and that to have legislation directing the Board of Transport Commissioners to do something on the assumption that since 1938 there has been a disturbance of those relationships, is to my mind the essence of bad legislation. I have not any objection to them looking at port relationships at all, but I think legislation compelling them to do something on an assumed basis that there is a disturbance is just utterly wrong.

It is clear, however, that the Maritime ports, being on a parity with United States ports despite their greater mileage from the industrial sections of Canada, are already in a preferred position by being on a parity with United States ports. It is also clear that as existing relationships with United States ports are to be disturbed by the Board in this country, retaliatory measures by the I.C.C. at the instance of the United States railroads is inevitable. Indeed, cases of this kind are already on record before the I.C.C.

I then come to my next subject, on page 108 :

INDUSTRIAL LOCATION AND THE RATE
STRUCTURE -- NEUTRALITY AS BETWEEN
RAW MATERIALS AND FINISHED PRODUCTS

The submission to your Commission on this question is made solely by Alberta in its brief entitled "Industrial Location in Alberta and the Present Rate Structure". At p. 54 of this brief Alberta submits that "the rate relations should not discourage producer location; that a processor or manufacturer may make complaint to the Board and that if he is able to satisfy the Board that his contention is sound, the Board should make necessary rate adjustments."

The changes in the language which I have quoted from that contained in the original brief were proposed by Mr. Harries on November 30 before your Commission. That is to say, Mr. Harries in his evidence suggested certain changes he made.

The means by which effect is to be given to this submission appear as an amendment proposed by Alberta to the Railway Act by the addition to Section 321 (a). That is on page 17 of the Consolidation.

The legislation does not, of course, indicate how the result is to be achieved. One must turn to the brief itself and to the evidence of Dr. Stewart and of Mr. Harries, who appeared as witnesses.

You see, all I have said is that the Board : shall do certain things and that rates must not per se discourage, and so on.

The theory propounded by them - I am speaking now of Mr. Harries and Dr. Stewart - was very simply that in order to avoid the export of raw materials from Alberta in their unfinished state, and in order to encourage the processing of these materials within the province, the relationship between the rates on raw materials and products manufactured

from them must be neutral. This, according to Alberta, means that the relationship between these rates is to be established on what they call the input-output ratio.

(Page 23344 follows)

This ratio is the ratio of the weight of the processed materials after the processing to the weight of the raw materials used in the process. That is to say, if one hundred pounds of livestock produce sixty pounds of processed products, the relationship as between the rates on livestock and the rates on finished products would be in the ratio of 6 to 10. That is to say, a rate of \$1.00 on the finished product would involve a rate on livestock, for the same mileage, of .60¢.

At this stage, it would be well to consider the principles on which rates are made at present. Rates are now made, as the Commission is aware, on the value of service principle. This principle, I need hardly remind the Commission because it has been debated at length, is one which reflects in part the cost of supplying the service and in part the ability of the commodity to bear the rates. Thus some commodities move at less than their overall but not less than their out-of-pocket cost, cost, while others move at considerably above the overall cost of service.

Now it must be true that if the relationship between rates is to be arrived at on the basis solely of the weight lost in process, the value of service principle cannot be applied. It follows also that the cost of service principle cannot be applied. It would be pure accident if either of these principles could be given effect to while applying the principle of the input output ratio .

I say this because if the relationship between the rates on the products of the packing plants and the rates on livestock are to be fixed in relation to weight lost in process, quite obviously nothing by way of increased value attributable to the process would necessarily be reflected in the rate.

It seems to me that is almost axiomatic. If you are going to fix it arbitrarily on weight lost in process, the value imparted in process can be given no weight in fixing the rate.

Moreover, livestock and the products of the packing houses would not have either the same cost of handling or the same loading characteristics. It follows, therefore, that the application of the input-output ratio, weight lost in process, would ignore factors of differences in cost of transportation as between the two.

Alberta, in a study of this matter, filed with your Commission at p. 10797, indicates that this input-output ratio is what may be called a critical relationship. It is obviously critical in relation to the so-called principle of neutrality because neutrality as between the rates on raw materials and on finished products could only be achieved by giving absolute effect to that relationship.

On the other hand, the parity of rates between raw materials and finished products would be the reverse of neutrality. That is to say, if the rates on meats were the same per 100 lbs. as the rate on livestock, it would be a definite encouragement to the production of meats in or near the source of supply of the livestock. Therefore, neutrality can be achieved only to the extent that it is possible to give effect to the input-output ratio. That is the fundamental basis upon which my argument is put. Any deviation from that ratio departs from the neutrality which Alberta proposes.

It follows, therefore, that since the value of service principle and the cost of transportation are inherently factors inconsistent with the arbitrary relationship established in reference to the weight lost in

process, the principle of neutrality which Alberta proposes must be inconsistent in principle with the present standards of rate-making.

My first submission, therefore, is that it is impossible to give effect either to the value of service principle or to the cost of service principle and still give effect to what Alberta proposes.

In this connection, Alberta is faced with an impossibly inconsistent position. On p. 10866 (Vol. 56) Professor Stewart stated that the prime consideration which fixes the limits within which this neutrality must operate, is the input-output ratio. However, when faced with the possibility that the cost of service on the finished product might make it impossible to establish such a relationship, Professor Stewart said, on the same page,

"As I see it, it would be quite open to the Board, after hearing the sort of application that we have in mind, to say that it is impossible to apply the principle in this case."

THE CHAIRMAN: Pardon me, would the amendments submitted by Alberta leave the Board this discretion that Professor Stewart said they should have?

MR. EVANS: No, sir, definitely not. It is an obligation of the Board in the language of the Section:-

"The Board shall upon application by an interested party or parties prescribe or direct the company to establish tolls on raw materials and tolls on products made in whole or part from such raw materials, in such a manner that the relationship between the tolls on raw materials and the tolls on products made therefrom shall not per se discourage..."

Now, my point has been that in order not per se to discourage, the only thing you can take into account is weight lost in process. Otherwise you have got other considerations that creep in. Now, I have in mind that Professor Stewart, recognizing that you could not, without discarding these other principles, have his principle applied, was prepared to have it open to the Board to say that it is impossible to apply, if cost of service should require to be given effect to. At page 10867 he said:-

"I think it would be open to the Board to say that to make an adjustment of the relative rates to effect neutrality would so offend other principles of rate regulation that the Board could not conceive of it."

I pause to point out that if we are not to give effect to the principle where it offends existing principles, there is no need to base the change in legislation at all.

He then went on at the same page to condemn the cost of service principle. When I pointed out to him that I was not talking of the cost of service as a principle, but merely of the cost of service which would be an element in the rate, he stated:-

"I would think that the Board could properly take whatever evidence could be given on cost of providing service and take that into account."

I then went on, however, as follows:-

"Q. Now, which would you advocate should take precedence in the matter of the fixing of rates?

A. Neutral rates."

I then pressed him on the matter of the value imparted to the raw material in the process, and asked:-

"Would you concede anything in your neutrality principle to the value of service?

"A. Yes, I would concede something to the value of service, although that is equally difficult to determine precisely."

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When I pressed him still further on the matter of the value and cost of service, Professor Stewart, at p. 10869, said:-

"I think it would have to be determined by the Board on the evidence before it, and as to the extent of the adjustment that was required, the degree to which it might offend the cost of service principle or the value of service principle, to decide whether it was possible to apply it."

THE CHAIRMAN: Now then, the sum and substance of Professor Stewart's position, his evidence, does it mean that neutrality of rates should prevail wherever possible in the opinion of the Board? Is that what it amounts to?

MR. EVANS: Well, that is as much as saying - -

THE CHAIRMAN: I say, is that what it comes to?

MR. EVANS: I think that is in substance what he has got. I am having the greatest difficulty following it because what I say is that you cannot have neutrality without giving effect to the input-output ratio which is weight lost in process. Now, if that happens to correspond with cost of service and value of service principles, as they are now applied, you might by accident find a relationship, but it would be pure accident; they are inherently inconsistent with one another, because obviously some value must be imparted in a process, otherwise it does not pay you to carry out the process.

Now, if you are going to impart value you quite obviously cannot reflect that in a mere principle that gives effect only to weight lost in process.

Now then, if you have different loading and handling characteristics (meat, for instance, has to go in refrigerator cars and so on) then you cannot give effect either to the cost of service principle. The only way you can find the relationship under present principles corresponding to what he wants, would be a sheer accident. It would be the most unusual accident I should think that you could imagine, because the one principle is almost a mathematical calculation.

He went on at the same page and on the following page, to agree that he saw great difficulty "in framing what we would like to see in the Act about this." "That is true, yes".

With regard to the theory of reasonableness, I put to him that the Board's fundamental problem in dealing with relationships is "reasonableness having regard to the avoidance of extremes and tying yourself too closely to rigid principles."

"A. I agree with that entirely."

He went on to say that with this modification

"we would like the relationship between raw material rates and finished products rates to enter into consideration of reasonableness."

The position is perhaps pointed up in the evidence of Mr. Harries at p. 10909 (Vol. 56). After stating at that page that Alberta desired the relation to reflect the input-output ratio, Mr. Harries was cross-examined on the use by Alberta in its brief of the example of the rates on wheat and flour. I put to him that the rates on wheat and flour are on a parity and that because it cost more to transport flour than wheat, and because there was some loss in the processing of wheat into flour, parity of rates was the reverse of

neutral. I also put to him that the flour had a higher value than wheat, all of which he agreed to.

At p. 10911 Mr. Harries agreed that in view of these facts it would rather suggest that the rate on flour should be higher than the rate on wheat. But, when I pressed him on the matter that this indicated the reverse of neutrality, he refused to agree.

In my submission, Mr. Harries' refusal at this stage to go along with what must be obvious, amounts to an inconsistency in his position. In fact, I think it points up the entire inconsistency in Alberta's position on this question. They say that the flour and wheat rates are neutral. You see that ⁱⁿ paragraph 3 on page 32 where they say:-

"(3) The Flour Milling Industry is an example of our third general classification of raw material-finished product rates. It demonstrates a rate relation between a raw material and a processed product which has a neutral effect upon the location of processing plant."

As a practical matter, the Commission will, I am sure, give great weight to the evidence of Mr. Jefferson on this subject, beginning at p. 15507 and continuing to 15538. I do not propose to read extensively from Mr. Jefferson's evidence, but I direct attention to the fact that as a practical traffic officer, he could not envisage how rates could be made on the basis which is proposed by Alberta. He pointed to the fact that livestock includes cattle, sheep and hogs and that fresh meats and packing-house products also include the products of all three kinds of livestock. He pointed out that the weight lost in processing each of these categories of livestock was

Mr. Evans

different and rates which are now therefore on a parity for all three animals and their products would have to be based on different relationships in order to apply the principle of neutrality.

There are, of course, other difficulties. I would name only three of them.

(1) All of the various provinces of Canada would be entitled to the same treatment. This would, if the rates are correctly designed to give effect to the neutrality principle, produce on the part of each province a desire to have its own raw materials processed within the province.

The extent to which this would disturb existing industry would perhaps not at first sight be fully appreciated. For example, Alberta mentions in its Brief the matter of the relationship between the rates on tallow and the rates on soap. Mr. Harries at p. 10902 said that under present circumstances, because a necessary ingredient, caustic soda, is not now produced in Alberta, the existing rates are acceptable, but he went on to say:-

"If and when you get caustic soda produced in Alberta, the trouble that we would find in the rates on soap and tallow is that they do not conform with what we have called the principle of neutrality."

This means quite clearly that as discoveries of raw materials are made in each province, applications would be made to establish these so-called neutral relationships. No industry locating elsewhere would be sure of a continuance of its markets in Alberta, for example, for soap, if at some future time caustic soda should be discovered there, because the rates which the producer elsewhere must rely on to move his traffic would be changed overnight. This is apparent from the language of the

section proposed, namely, 321(a) because any person interested may at any time make an application and it is thereupon the duty (see the use of the word "shall") to establish rates in such a manner "that the relationship between the tolls on raw materials and the tolls on products made therefrom shall not per se discourage the processing, manufacture or other conversion of such materials at or near the point of production."

(2) I took up with Professor Stewart the difficulty which would result from the discovery in Alberta of the large oil fields, beginning at p. 10839 et seq (Vol. 56). I pointed out to him that with the discovery of oil in Alberta a pipe line is being built to carry away crude oil and that the application of the neutrality principle could not be brought to bear until there were refineries in Alberta sufficient to handle the output of crude oil.

At p. 10840 the following exchange took place:-

"Q. Now, in your mind, no matter whether you achieve that objective or not, the production of oil may proceed more quickly than you could develop refinery capacity to handle it?

"A. Yes.

"Q. And so you are really face to face with a choice of having low rates to get your oil out of the province or of shutting up your production until you can, by this process of neutrality, make it possible for refineries to establish themselves in the province of sufficient

capacity to handle the output?

"A. There is an immediate problem, I appreciate, yes."

At p. 10842 I put to him that if railway rates became neutral and the pipeline had to fight for business with the railways, the pipeline would reduce its rates and exert pressure on the railways to reduce their rates on the carriage of crude oil. Professor Stewart agreed with this difficulty. It follows therefore ^{that} /with an established pipeline involving a large investment and with the possible competition between the railways and the pipeline for business, the so-called neutrality principle could not be applied in such a case.

(3) Professor Stewart readily agreed that centralization of industry was not necessarily a detriment to the consumer (see p. 10862). It is also admitted that low rates in themselves will tend to geographical distributions and to centralization of industrial production (see p. 10836).

It is, I think, unquestionable that the adoption of Alberta's proposal would provide a great disturbance to industry.

(page 23354 follows)

I now wish to discuss the proposed legislation for a moment.

THE CHAIRMAN: Proposed legislation -- have you in mind Alberta?

MR. EVANS: Yes, this is on the same subject.

THE PROPOSED LEGISLATION

The proposed legislation must be examined, I submit, in the light of the present powers of the Board.

The present powers of the Board are unquestionably sufficient to establish any relationships which are in conformity with the value of service principle and with the reasonableness of the rates in themselves. It would only be a rejection of these existing principles that Alberta could achieve what it seeks to achieve.

This is no doubt why in the amendment proposed the word "shall" is used, so that the Board shall be required to establish the necessary neutral relationship.

That the Board had unquestioned power to deal with this subject so as to apply the existing rate-making principles is clear from its decision referred to at page 43 of Alberta's brief in Alberta and Saskatchewan, et al, v. Canadian Pacific and Canadian National (1928) 18 J.O.R.&R. 406. In the quotation of the judgment on page 44 of the Alberta brief, the following statement appears at page 414 of the judgment:

"While I am not convinced of the necessity nor indeed the propriety, of establishing a percentage relation between these two sets of rates"--

This was meats and livestock.

"--nevertheless it is not difficult to see that a condition could arise in which special rates on livestock being accorded to eastern packing companies, would operate to the disadvantage of western packers in marketing their finished products in competition with eastern packing houses."

The further quotation at the bottom of page 44 of the Alberta brief is from page 418 of the judgment:

"The equalization above contended for would involve a rearrangement whereby the combined rates on live-stock in and on meat and packing house products outward, would produce through transportation charges equal for all Canadian packers."

Getting very close in that case to this same proposal to the Board, and I am suggesting this judgment shows that the Board dealt with it on its merits.

"As a matter of tariff construction this would seem to be impracticable, and would resolve itself into an attempt to create such a condition regardless of the reasonableness of the rates per se, or of the anomalies that would be created."

I say that is why this section says the Board shall do these things because the Board on its merits would not do it, and thought it was impractical and were not convinced of the necessity or the propriety of doing it.

It is thus clear that what the Board was considering in that case amounted in reality to the principle now contended for. Their refusal to give effect to it under their present powers is what leads Alberta to make it compulsory on the Board by legislation.

It will be noted by your Commission that the amendment proposed by Alberta does not make any provision such as Professor Stewart Agreed should be made by way of recognizing the cost of service or the value of service principle, nor for that matter does it permit the Board to go into the matter of the reasonableness of the rates per se.

I understand that an amendment makes it unnecessary to argue the next paragraph.

THE CHAIRMAN: You say there is an amendment?

MR. EVANS: Yes, Mr. Frawley amended his section by removing the second proviso during his argument, the second proviso to 321(a). I do not need to deal with it. That will eliminate the paragraph on page 117 in which I commented on that. That can be dropped.

THE CHAIRMAN: All right.

SMR. EVANS: That eliminates one paragraph on page 117.

My submission to your Commission is

- (1) that the proposal of Alberta is a practical impossibility as a matter of legislation
- (2) that the Board now has adequate power under the present rate-making principles to establish reasonable relationships.
- (3) that the Alberta witnesses clearly do not want to do away with existing principles of rate-making but the proposed legislation does do just that.

It is impossible to do more than to leave with the Board the discretion to deal with such matters. Professor Stewart, in the quotations I have given from his evidence, obviously proposes that these matters shall be for the Board.

The matter then boils down to this -- Are we to have legislation compelling the Board to give neutrality, or are we to give the Board a discretion? If we give the Board a discretion, then there is no need for legislation. If we compel the Board to accept the idea of neutrality, we must be prepared to throw overboard the value of service principle and make rates which neither reflect value of service nor cost of service.

I then have a short argument on the cost of service principle. I may say there is one thing I should have drawn

to your attention. Mr. Frawley in his argument referred to the Hormel case. That was a case in which westbound rates on livestock and meats were before the Interstate Commerce Commission, and it is case upon which Mr. Frawley has placed some reliance. It is in his brief, and it was also mentioned in his argument.

THE CHAIRMAN: What do you call the case?

MR. EVANS: The Hormel case. I have not got the citation. I just have a note that I was to refer to it. It is referred to in Mr. Frawley's argument, and it is in his brief. The only thing I wanted to clear up about that was that Mr. Frawley pointed to that as indicating that the Interstate Commerce Commission was accepting his theory. All I want to say is that the Interstate Commerce Commission never established any relationship such as Mr. Frawley wants established.

In that case they made the westbound relationship between meats and livestock the same as the eastbound relationship, and they had previously in some case fixed the eastbound relationship, but so far as I know there has never been acceptance of this weight lost in process principle of relationships. If there is propriety in a relationship of any kind between livestock and meats then quite clearly our Board has exactly the same power to establish that relationship today. The case is Hormel v. Santa Fe, 263 I.C.C. 9.

THE CHAIRMAN: What year?

MR. EVANS: It is a comparatively recent one from from the volume number, I should think.

MR. FRAWLEY: 1945.

MR. EVANS:

(page 23358 follows)

COST OF SERVICE PRINCIPLE

I have not had an opportunity of preparing an argument on the subject of the cost of service principle advocated by British Columbia. I would, however, like to refer the Commission to the discussion of the value of service principle contained in Dr. Locklin's book beginning at page 148.

In particular, I draw the Commission's attention to the section on pages 152 to 154 under the title "What the Traffic Will Bear."

I should also like to deal very shortly with the suggestion made by Mr. Brazier that the cost of service is a feasible basis for rate-making. This may also serve to meet Mr. Shepard's suggestion made in support of a different kind of argument that cost accounting is, as he put it, feasible.

Dr. Locklin on pages 157 and 158 under the heading "Cost Allocations and Rate Making" refers to the school of thought which believes that overhead costs should be allocated to particular kinds and units of traffic and that all rates should be based on these allocations. Dr. Locklin comments:

"The advocates of this view maintain that cost accounting has developed into a science and that practically all costs can be allocated. This view seems to rest upon a failure to understand the economic principles involved. It is true that all costs can be allocated, but as one writer has expressed it, 'that fact of itself is no more significant than is the possibility of obtaining an arithmetical average of any fortuitous collection of numbers.'

The fundamental fallacy in any apportionment

"of expenses that do not vary with the volume of traffic lies in the fact that the cost depends upon the volume of traffic, and the volume of traffic depends upon the rate charged. To some extent cost of carriage is a function of the rates, not the rates of the cost; or, as Professor Harbeson has put it, 'the overhead cost per unit is price determined rather than price determining.' 'Cost accountants', says G.P. Watkins, 'are too likely to assume relations as fixed which may change as a result of prices based upon their cost analysis.'"

The Commission will also find that Dr. Bigham in his book "Transportation Principles and Problems" has a good deal to say. At page 107, after analyzing railway costs generally, Dr. Bigham near the top of the page says:

"The analysis given is sufficient to show that railway costs cannot be allocated to particular hauls except arbitrarily. As will appear later, this fact is of great significance in the determination of rates."

The Commission will find a discussion of the cost of service principle at page 326 and of the value of service at page 329, of Dr. Bigham's book.

It will be noted that at page 335, Dr. Bigham, as indeed does Dr. Locklin, makes it clear that "If total profits are kept at a reasonable level, charging what the traffic will bear is a sound principle of rate making."

He goes on to give an illustration of how the principle works. It is clear from the example he gives how the railway is prevented from maximizing its profits in the application of such a principle, that is to say, the maximum earning power or return on investment cannot be exceeded and that this is a brake upon the railways'

ability to exploit the principle where the traffic will bear any increase which the company may say.

Mr. Brazier at page 22286 made a statement about what was held in the Granby Case by the Board as follows -- I don't know from the transcript whether he was purporting to quote from the Board or was paraphrasing it but this is the quotation as it appears in the transcript. This is Mr. Brazier speaking:

"No, we will not make any order in regard to cost of service. It is not a factor which is made a consideration as far as we are concerned in fixing the rates."

My submission is that this is a misleading statement. No such statement was made in the judgment. In that case, 64 C.R.T.C. 243, the Board merely refused to order the railway company to undertake the work estimated to require six weeks which would be required to prepare the information asked for. What the Board actually said in that case, page 245, was -- and I ask the Commission to compare what the Board said with what Mr. Brazier is quoted as saying the Board said:

"The Board has, however, never adopted the cost of providing service as the sole indicator of the reasonableness of any rate. In a general way it may be stated that the cost of service factor is more particularly valuable in determining whether any particular rate is reasonably compensatory to the carrier in cases where there may be reason to believe that a rate is at the borderline of cost. In this event the principal consideration would be whether such rate was so low as to cast an added burden upon other traffic."

(Page 23364 follows)

Speaking generally of the controversy raised by British Columbia's proposal, I should like to say this:-

(1) Mr. Brazier in his argument said that some effect would have to be given to the value of service. If that qualification is put in, then all that remains is that the value of service principle is to be retained. It follows that even if Mr. Brazier is right and operating costs vary 100% with traffic, the value of service principle will automatically, properly applied, reflect that result. However, the only writer I have been able to find who suggests that this is true -- that is, that one hundred per cent costs are variable -- is Professor Heeley on whom Mr. Brazier apparently relies, and I do not think Professor Heely goes quite that far.

(2) There is no need to abandon the value of service principle even if Mr. Brazier is right that all costs vary with traffic.

(3) In any case, whether all operating costs vary with traffic or not, profits, that is to say, return on investment, may be relatively constant and contributed to in different degrees by different traffic on the value of service principle.

(4) If Mr. Brazier is right that competition will reduce rates on high-valued traffic to cost, which he seems to argue by reference to Mr. Fairweather's evidence, the cost of service will automatically be applied. I say this because, if competition were to be sufficiently severe that railway rates on high-valued traffic had to reflect only actual railway costs, it would follow automatically that the low-rated traffic would also have to contribute actual costs in total. Assuming that the same conditions were then applied to the low-valued traffic, we would automatically come to a point at which all traffic would be

carried at cost. This does not need any change in the law to accomplish. It will follow as a matter of certainty, if such conditions are met.

On the other hand, Mr. Brazier's argument amounts to this -- because that may conceivably happen, your Commission should recommend accepting it as inevitable and put it into effect as a basis for rate making before it does happen.

This amounts merely to an argument that the value of service principle is an improper principle to apply and, in my submission, Mr. Brazier cannot and has not established that.

Thank you very much.

THE CHAIRMAN: All right, Mr. Spence.

ARGUMENT BY MR K. D. M. SPENCE

MR SPENCE: May it please the Commission:

My argument will fall under six heads, as follows:

The first one, Proposed Amendments to the Railway Act.

Secondly, Proposed Amendments to the Maritime Freight Rates Act.

Thirdly, Reparation.

Fourthly, Canadian National-Canadian Pacific Co-operation.

Fifthly, Canadian Pacific Proposed Amendments to the Railway Act as to Grade Crossing Protection.

Sixthly, certain Amendments Proposed by the Railway Transportation Brotherhoods.

THE CHAIRMAN: Does that first item, Proposed Amendments to Railway Act, include the Canadian Pacific's amendments?

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MR SPENCE: Well, I deal with those, the Canadian Pacific's amendments as to grade crossings, in a separate argument, my lord; and also in my first argument I do not propose to deal with all of the---

THE CHAIRMAN: I have in mind now the C.P.R. amendments as given to us, for instance on the fixing of rates, investment and rate of return, and so on.

MR SPENCE: No, my lord; Mr. Sinclair will deal with those. In my argument as to the amendments to the Railway Act I do not propose to deal with them all, because Mr. Evans and Mr. Sinclair will cover some of them themselves.

THE CHAIRMAN: This first chapter of yours, pages 1 to 16, deals with amendments proposed by the provinces; is that it?

MR SPENCE: Yes, my lord.

In this part of my argument I propose to deal with the amendments to The Railway Act that have been suggested by the various Provinces and other parties appearing before your Commission.

THE CHAIRMAN: Are those amendments that you are dealing with now set out in this consolidation?

MR SPENCE: Yes, my lord.

My purpose is not to go into all of the pros and cons of the purposes behind these amendments, since most of the questions of principle or policy are covered elsewhere in our arguments. In the main, my approach will be to consider the various proposals as pieces of legislation and their place in relationship to the remainder of The Railway Act.

In order to facilitate this kind of examination, I have prepared a consolidation into one document of all of the amendments submitted in draft form to the Commission,

and Mr. Evans has already handed the Commission copies of that consolidation.

It will be observed that in addition to those sections as to which amendments are proposed, I have included some of the other sections that are related to or have some bearing upon the proposed amendments. I do not intend to suggest that these additional sections are by any means the only ones in the Act that bear any relationship to the amendments; it would have been impossible to include them all without typing practically the whole Railway Act and making the document unduly cumbersome.

Perhaps I should start by reminding the Commission of a fact of which it is already well aware, namely, that the drafting of legislation is a task for a highly skilled and experienced expert if errors, omissions, ambiguities and contradictions leading to endless litigation are to be avoided. I hasten to add that I have no intention of posing as anything in the nature of an experienced legislative draftsman, but even to my unskilled eyes there appear to be enough of these errors, omissions and contradictions in the proposed clauses to throw The Railway Act and those including myself who may have to work with it for some years to come, into utter and hopeless confusion.

As a small example, let us look at the first amendment shown on p. 1 of the consolidation, which is a suggestion made by the Province of Saskatchewan for the alteration of Section 25. The purpose of this amendment seems to be to allow the appointment of accountants, economists, engineers and rate experts for the technical assistance of the Board. Under Section 21, however, which I have included just above Section 25, it will be seen that there is already a provision in the Act for appointing these technical experts by Order in Council, and indeed the Board already has on its staff a

considerable number of experts who were no doubt appointed under Section 21.

Section 25, however, says that they may be appointed "in the manner authorized by law", which means no doubt through the Civil Service Commission, and thus if Saskatchewan's amendment was to be adopted the Board would have technical experts appointed in two different ways.

It should also be noted that by Saskatchewan's amendment of Section 25 the words "officers, clerks" are struck out, no doubt with the intention that such employees will be included under the words "and other employees". It is possible, however, that if the ejusdem generis rule were applied, "other employees" might mean other employees of the same kind, that is, technical experts, and the power to appoint the Board's non-technical staff would be lost.

Speaking of the amendment as a whole, I suggest that it has no purpose. No need for such a change has been shown and this proposal seems to come within the category of unnecessary meddling with The Railway Act that will be seen constantly throughout these amendments.

Section 31, which is the next Section for which Saskatchewan proposes an amendment, deals with the Board's Annual Report, and I ask what evidence there is of inadequacy in legislation as to the Annual Reports now made by the Board? We have not heard either here or elsewhere any suggestion that there was need for a change in this respect, and the volume of material that Saskatchewan proposes to require the Board to include would, if it was to be of any accuracy and value at all, require the concentrated efforts of the Board and its technical staff for much more than the extra month that Saskatchewan would allow for its preparation.

THE CHAIRMAN: In your consolidation, on the first page of your consolidation, the proposed amendment, there is

a great deal of matter struck out.

MR SPENCE: Yes, my lord. The parts with the diagonal strokes are the parts that are at present in the Act but which the proponents of the amendments say should be struck out. The parts that are underlined are new words that they suggest should be put in. For example, under section 31, the words "within two months after the thirty-first day of December" are at present in the Act, and the words next following, "on or before the thirty-first day of March", are not in the Act; they are proposed to be put in by Saskatchewan.

THE CHAIRMAN: That would give another month, would it?

MR SPENCE: Yes, my lord. Then (a), (b) and (c) are at present in the Act; those sub-clauses (a), (b) and (c) are at present in the Act.

THE CHAIRMAN: Well, there are sub-clauses (a), (b) and (c), but do they contain the same matter?

MR SPENCE: They contain the words that are struck out at the bottom of page one, my lord. Then Saskatchewan proposes new clauses (a), (b) and (c), which I have shown on the second page. .

THE CHAIRMAN: Would the present (a), (b) and (c) be struck out, according to this amendment?

MR SPENCE: Yes, my lord; according to Saskatchewan those clauses (a), (b) and (c) are to be repealed and a new set of clauses (a), (b) and (c), which are at the top of page 2 of the consolidation, are to be substituted for them.

THE CHAIRMAN: Well, it looks to me as if the main difference between what is now required and what the amendments require would be this statement as to the condition of the railways; is that so?

MR SPENCE: Saskatchewan proposes a whole series

of---

THE CHAIRMAN: " . . . the financial condition and requirements of Canadian Railways, the condition of railway property, railway expansion, abandonment of lines,"

and then it goes on to the Board.

MR SPENCE: Yes; there is a whole mass of information, particularly in the new clause (a), that Saskatchewan would require the Board to put into its Annual Report, and, as I say in the middle of page 3:

No explanation is given of how the Board is to obtain the information required by proposed Clause (a). Under Sections 379 to 384 inclusive, the railways may be required to provide some of this information but not by any means all of it, and under Section 384(3) much of the information that the railways are required to supply is not to be open to the public or published, but is only for the information of the Board. Thus, it could not be used in the Board's Annual Report, which is a public document. Unless Section 384 is also to be amended, which Saskatchewan has not proposed, the Board will by the amendment of Section 31 be left in the position of being required to issue an Annual Report upon subjects for which it has not the means of obtaining the information or of making the information public.

Now, turning to Section 33, which is on page 2 of my consolidation, it is found that Saskatchewan proposes to give the Board power to inquire into, hear and determine any application requesting the extension or completion of a railway line, and to make recommendations to the railway company or the Government for such extension or completion. That will be found at the bottom of page 2, the underlined part.

My question is what possible purpose this provision could serve. The Railway Act contains no machinery for compelling a company to build a railway, and Saskatchewan does not suggest any such machinery.

THE CHAIRMAN: You mean to say, then, that this proposed amendment would suggest a complaint but provide no remedy?

MR SPENCE: Yes, my lord, that would be the situation. The Railway Act, as I say, has no machinery for compelling a railway company to build a railway. No railway line over six miles in length may be built without an Act of Parliament. If the intention is to impose some obligation upon the railway to apply for enabling legislation,---

THE CHAIRMAN: Pardon me. Does not the following subsection go on to say that the Board may make orders on these complaints -- subsection 2?

MR SPENCE: Oh, yes.

THE CHAIRMAN: You see, subsection 1 is divided into three paragraphs, (a), (b) and (c).

MR SPENCE: Yes, my lord.

THE CHAIRMAN: Which formulate complaints that may be made; but then 2 goes on and says:

"The Board may order and require any company or person to do forthwith, or within or at any specified time . . ."

MR SPENCE: Yes, my lord, but it is limited to any act the Board may order:

" . . . any act, matter or thing which such company or person is or may be required to do under this Act . . ."

The railway is not required under any section of this Act to build a railway if it does not have an Act of Parliament first.

THE CHAIRMAN: Then, if that is the case, why was that subsection 2 made a part of this same section which provides for the formulating of complaints? In respect of that (a), (b) and (c) you say that, while this would compel the Board to hear complaints, it does not empower the Board to provide any remedy; is that it?

MR SPENCE: It does not empower the Board to compel a railway to construct a line. It is only sub-clause (c) that is new in this, my lord. This sub-clause (c) has been inserted here by Saskatchewan in this general clause as to the Board's jurisdiction.

THE CHAIRMAN: It is the whole of paragraph (c) that you are particularly concerned about -- is that it? -- "requesting the extension or completion of a railway line or lines into or through a new or proven area"; is that so?

MR SPENCE: Yes, my lord, that is the section---

THE CHAIRMAN: -- "on the determination that the extension or completion of such line or lines shows reasonable promise of making a contribution to the local or national economy, may recommend the extension or completion of such line or lines; . . ."

Now, who may recommend? It would be the Board, I suppose.

MR SPENCE: That apparently---

THE CHAIRMAN: "The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested," complaining about certain things not having been done which the Act requires to be done, and then requesting the Board to make an order or give directions.

MR SPENCE: Yes.

THE CHAIRMAN: " . . . or with respect to any matter, act or thing, which by this Act, or the Special Act" --

That, I suppose, would be---

MR SPENCE: The special Act of Parliament.

THE CHAIRMAN: Incorporating a railway

MR SPENCE: No; the special Act of Parliament which the railway might have passed to build this particular line.

THE CHAIRMAN: Yes, giving it authority to build.

MR SPENCE: Yes, my lord.

THE CHAIRMAN: Then:

"(c) requesting the extension or completion of a railway line or lines" --

I have already read that.

MR SPENCE: Then, having done so, having made this investigation, the Board may recommend the extension or completion of such line or lines;

"such recommendation may be made to a railway company or companies or to the Government of Canada."

Now, whether the Board makes the recommendation to the railway or not, that does not compel the railway to build the line, and there is nothing in the Act that does compel the railway to build the line. The special Act that the railway obtains from Parliament is only an enabling Act, in any event; it is not an Act that would force the railway to build if it did not want to. So I say that this section can serve no purpose at all.

THE CHAIRMAN: Well, the time has come to adjourn.

---The Commission adjourned at 4:10 p.m., to meet again at 10:30 a.m. on Monday, May 22, 1950.

A.R.

Canada

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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Monday, May 22, 1950.
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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Monday, May 22, 1950.

THE HONOURABLE W.F.A.TURGEON, K.C. LL.D. - CHAIRMAN

HAROLD ADAMS INNIS - COMMISSIONER

HENRY FORBES ANGUS - COMMISSIONER

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J. J. Frawley, K.C.) Province of Alberta

C. D. Shepard,) Province of Manitoba

C. W. Brazier) Province of British Columbia

M. A. MacPherson, K.C.) Province of Saskatchewan.

- - - - -

Ottawa, Ontario,

Monday, May 22, 1950

MORNING SESSION

ARGUMENT BY MR. SPENCE (Cont'd)

THE CHAIRMAN: Where do you take on today, Mr. Spence?

MR. SPENCE: My lord, at the adjournment on Friday I was at the top of page 4 of my notes of argument and I was dealing with a proposed amendment to Section 93 of the Act which is at the bottom of page 2 of the Consolidation. I had pointed out that this proposal is to give the Board the power to inquire into, hear and determine any application requesting the extension of completion of a railway line and to make recommendations to the railway company or to the government for such extension or completion.

My question was what possible purpose that provision could serve since the Railway Act contained no machinery for compelling a company to build a railway, and since Saskatchewan did not suggest any such machinery. No railway line over six miles in length may be built without an Act of Parliament. If the intention is to impose some obligation upon the railway to apply for enabling legislation, the amendment is entirely unnecessary since no railway would fail to seize of its own accord any opportunity for constructing a line that was economically advantageous. If the purpose is to have the Board propose legislation compelling the Company to construct a line that it does not desire to build, that would be confiscatory or oppressive legislation of the worst kind, and it is hardly to be conceived that Parliament would even consider it.

For these reasons I submit that no justification can be found for clause (c) of Section 33(1) proposed by Saskatchewan.

On page 3 of my consolidation at the bottom of the page, I have shown two amendments proposed by the Province of Manitoba for addition to Section 33. Sub-section 6 as proposed declares the Board to be an administrative tribunal and provides that it shall not be bound by its previous decisions, procedure or practice. My submission is that there is no need for this section. Obviously the Board is an administrative as well as a judicial tribunal, and this will be seen from numerous sections throughout the Act, of which I draw attention only to Sections 33(2), 36, 37, 49(5), 51 and 70, which provide in various ways for administrative functions to be carried on by the Board.

Under the present Act, the Board has never considered itself to be bound by its previous decisions, and I draw attention to Section 49(5) and Section 51. Those sections are printed in the Consolidation just for ready reference.

Under Section 49(5), it is provided that even if any decision or order of the Board has been made a rule of court it shall be optional with the Board as to whether such order or decision is to be enforced.

Section 51 provides that the Board may review, rescind, change, alter or vary any order or decision made by it.

In line with these sections, the Board has, in many cases, reversed previous decisions or declined to follow them.

THE CHAIRMAN: Do you give us examples of that? You say "The Board has, in many cases, reversed previous

decisions or declined to follow them". Have you any examples of that?

MR. SPENCE: There are many of them, by lord. I have not any at hand but I can very readily turn some up. Mr. Evans calls my attention to the Malagash Salt case. In that case I think three members of the Board sat on the original application and arrived at a decision; and thereafter the full board sat upon the case and reversed the decision of the first three.

THE CHAIRMAN: The full board, including the three who originally sat?

MR. SPENCE: Including the three who originally sat, yes.

THE CHAIRMAN: What do you call that case?

MR. SPENCE: The Malagash salt case. That is not the name of the case in the report, my lord.

MR. EVANS: I will get that citation.

MR. SPENCE: I will get the name and citation of it.

THE CHAIRMAN: Very well.

MR. SPENCE: Subsection 7 of Section 33, which is at the bottom of page 3 of the Consolidation, is proposed by Manitoba, and I suggest that that subsection is equally unnecessary. This amendment purports to give the Board power to hear any evidence that in its opinion is relevant; to provide that the Board is not bound by the legal or technical rules of evidence, and that the Board may make its own investigations for the purpose of reaching a decision. All of these powers are already held by the Board. The Board may, and does, make its own rules of evidence and conduct its own proceedings in its own way. It may, and does, make its own investigations of matters before it, and uses the results of these investigations for the purpose of reaching its decisions. I

need only cite the recent freight rate cases as examples of this procedure, and as to the powers of the Board concerning its rules of evidence and the conduct of its proceedings, I draw attention to Section 20(b) which provides that the Board may make rules and provisions respecting the manner of dealing with matters and business before the Board; Section 21 which provides for the employment of technical experts to advise the Board on matters before it; Section 33(3) which allows the Board full powers of a court to require evidence to be brought before it; Section 53 under which the Board may make general rules regulating its practice and procedure; all of the sections from 62 to 71 inclusive, which give very wide powers in respect of witnesses, evidence, inquiries and inspection; and Sections 379 to 384, under which the Board may demand production of various statistics and returns from the railways.

I submit that it seems obvious that the Province of Manitoba in proposing the addition of these Subsections (6) and (7) to Section 33 did not give adequate study to the powers already held by the Board. If Manitoba had done so, it could not have failed to observe that its proposals, if inserted in the Act, would only be redundant and confusing.

(Page 23380 follows)

MR. EVANS: The first decision in the Salt Case to which Mr. Spence referred is Halifax Fisheries v. C.N.R., 56 Canadian Railway and Transport Cases, 78. That was the judgment of the Board of three. In the same volume, page 134, will be found the judgment of the five reversing the first judgment.

THE CHAIRMAN: What are the respective pages?

MR. EVANS: The first decision is at page 78 and the other one at page 134.

MR. SPENCE: At the top of page 4 of the consolidation, there will be found another amendment proposed by Manitoba, this time as a subsection to Section 36. The existing Section 36 provides that the Board may make inquiries of its own motion with respect to matters covered by the Act. The effect of Manitoba's amendment would be to impose a duty on the Board to act of its own motion when, in the Board's opinion, such action was in the public interest.

THE CHAIRMAN: Does that not come to the same thing?

MR. SPENCE: I submit that it does, my lord. The clause mentions specifically the matter of just and reasonable rates, but it is not limited to rate matters.

I should like to draw attention to the saving words, "when in the opinion of the Board such action is in the public interest". If it were not for those words the Board would be derelict in its duty if it failed to take action immediately upon every single item upon which the Board might exercise its jurisdiction. The effect of the saving clause, however, is that the Board neednot act until it has formed the opinion that such action is in the public

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interest. Now, the Board does not and cannot have opinions on these matters until they come to the Board's attention and investigations are held. In the ordinary course the Board's attention would only be drawn to a matter by an application or complaint even if this subsection were in effect, and the Board could not possibly function in any sane and orderly way if this were not so.

While there might be occasions upon which the Board would direct its own attention to certain questions and undertake investigations of its own motion, it already has power to do this under the present Section 36; even if Subsection (2) were adopted the Board could not be held derelict in its duty for merely failing to turn its attention to some particular project or rate if it had not been requested to do so. It seems inevitable, therefore, that the proposed Subsection (2) would have no effect whatsoever in changing the law or practice from what it is under the present Act. That being so, there is nothing to be gained by adopting the amendment.

.....

As to the other proposal made by Manitoba and shown in the middle of page 4 of the consolidation, as a subsection to Section 38, Mr. Evans has dealt with this, and I only pause to point out that the Board is a court under the provisions of Section 9(2), and has judicial functions. These would be at least severely hampered by this amendment, and if the Governor in Council were to give directions to the Board as to its policy, the Board's jurisprudence would be reversed with every change in government.

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Section 44A proposed by Saskatchewan and shown on page 4 of the consolidation is a proposal of a different kind. It provides that the Board shall within one year, review and report to Parliament upon the corporate form of railway systems in Canada.

I submit that this is not a matter suitable for insertion in the Act. If the Government thought that there was any point in such an investigation, it could cause it to be done by a reference under Section 38 as it stands at the present time. There is no need to fill up the Act with temporary provisions of this kind. I do not propose to go into the merits of the proposed section. I merely say that as a temporary measure it has no place in the Act.

THE CHAIRMAN: It seems to me that may be something that the Minister of Transport could occupy himself with if he wanted to.

MR. SPENCE: Exactly. If the Minister of Transport wanted an investigation of that kind he has the machinery at his hand now under Section 38.

THE CHAIRMAN: We must not forget that we have a Department of Transport and a Minister. I think we are inclined to overlook that and talk about the Board all the time.

MR. SPENCE: Yes, my lord.

The amendments of Section 52(1) shown on page 5 of the consolidation have been dealt with by Mr. Evans so I do not refer to those.

.....

In the lower part of page 6 of the consolidation, and running over onto page 7, is a proposal by Saskatchewan for a new Section 78A. I can only suggest that this proposal would be an unnecessary interference with one of the most serious responsibilities of management.

THE CHAIRMAN: Where do you deal with that in your argument?

MR. SPENCE: Page 8, my lord.

It purports to prohibit any railway from issuing capital stock, bonds or other securities until authorized to do so by the Board, and it provides that the Board shall give approval only after an investigation, and only if the Board finds certain conditions to exist.

I submit no justification for such legislation can be derived from the facts as they exist. It would be a strange conception of the calibre of those in charge of this country's railways that would envisage a management needing to be told by a Board of Transport Commissioners whether management's proposals for capitalization were lawful and within the Company's corporate purposes, whether they were in the public interest; whether they would impair the Company's ability to function; and whether the proposals were "reasonably necessary and appropriate".

The Railway Act already contains a long series of provisions (Sections 72 to 160) governing the financial organization and powers of the Company. The effect of the proposed amendment would be to lift control out of the hands of the directors and shareholders and place it in the hands of the Board, which could have neither the detailed knowledge necessary for decisions of such moment, nor the responsibility for the consequences of its decisions.

I submit that nothing would destroy investor confidence more completely than to deprive the directors and shareholders of their right to control financing.

It is sometimes interesting to observe the results of combinations of some of the proposals for amendment made by the different parties. For example, let us suppose that Manitoba's amendments to Sections 38 and 52(1) were adopted so that the Governor in Council could give directions to the Board as to the policy it was to follow, and let us suppose also that this Section 78A was inserted in the Act. Obviously, the result would be to transfer control to the government of Canadian Pacific financing, which would be tantamount to government control of the railway itself.

.....

At the middle of page 7 of the consolidation there is another Saskatchewan proposal, this time for amendment of Section 127 by a clause providing that the Railway may not, without approval of the Board, pay dividends out of any fund other than its accumulated earnings, out of capital, donated surplus or land grant surplus. The proposal also is to prohibit the granting of any special rights or benefits to shareholders.

I call attention to the present Section 27 which says that dividends may be paid out of net profits, and to Section 129 which prohibits the payment of dividends out of capital or so as to reduce or impair the company's capital. What more is necessary? Saskatchewan has tendered no evidence proving that a provision of the proposed kind is necessary or desirable.

It will be observed that there is no definition in the subsection of what are called "accumulated earnings". The question arises as to whether the provision would eliminate dividends paid from the company's other income. If so, what purpose has this provision except to destroy the company's credit?

(Page 23386 follows)

A whole series of other questions arises in connection with the amendment proposed. For example, what is the meaning of the words "donated surplus"? So far as I am aware no company possesses such a fund. If this is intended to cover payments made to us as consideration for our contract to build the railway, does it extend also to compensation paid to us under the Maritime Freight Rates Act, or payments received for carrying the mails?

Again, what is the meaning of the words "land grant surplus"? Would we be prevented from including in our dividends any revenues received from lands granted to us as part of the consideration for our contract?

What is the meaning of the words "special rights or benefits to shareholders"? Would this section prohibit us from issuing new shares by means of the very valuable plan of what are known as "shareholders' rights" to purchase stock at a price slightly below the market level?

I need only ask these questions to show how obscure and ill-conceived the proposed amendment is. If the answers are in the affirmative, the proposal can have no other motive than the utter destruction of the company's credit, and I submit that it should be summarily rejected by this Commission.

.....

On p. 8, there is a further example of what I am compelled to term officious meddling, in the form of a proposed Section 147A submitted by Saskatchewan. This section proposes to prohibit a railway company from acquiring ownership or control of any non-railway company except upon a series of conditions to be established to the satisfaction of the Board.

If this Section had been in effect in earlier years it might have prevented the acquisition of our airlines,

our ocean steamships and our interest in Consolidated Smelters, to give only a few examples.

The fact that the Canadian Pacific did acquire those interests has been of tremendous advantage to the travelling and shipping public, and to the country as a whole. The money used for the purchase of these non-railway companies was shareholders' money which could legally and properly have been paid out in dividends. Instead of leaving it in the Company for investment the shareholders would have had a perfect right to draw it and invest it themselves in the same or any other enterprises, or they could have set up a separate company to make the investments for them, and the only difference would have been that the Railway Company and its users would not have received the advantages they have gained.

What possible business should it be of the Board of Transport Commissioners to interfere with what the shareholders do with their own money? Decisions as to acquisitions of this kind have no other place but in the hands of the shareholders themselves, or of the management to which they entrust that duty.

.....

In the middle of p. 10 of the consolidation is shown a new Section 153A proposed by Saskatchewan. This amendment purports to restrict the amalgamation of railway companies or the acquisition by one company of control by the lease or ownership of another.

This amendment is, in my submission, unnecessary and redundant.

Under Section 147, which is shown at the top of p. 8 of the consolidation, the company is not permitted to purchase shares of another railway company except by Special Act. Similarly, amalgamation is not permitted except by

Special Act, as may be seen by Section 151, and even if the Special Act is obtained, the amalgamation must be sanctioned by the Governor in Council on recommendation of the Board under the provisions of Sections 151, 152 and 153.

There are various Special Acts that contain prohibitions against amalgamation, such as for example, the Canadian National-Canadian Pacific Act, Section 27. A little more study by the proponents of this amendment would have shown it to be unnecessary and confusing in view of the provisions already in existence.

.....

At the bottom of p. 10 is a proposal by the Railway Transportation Brotherhoods, with which I am dealing elsewhere, and for the same reason I will pass over the amendments on pp. 11, 12 and most of p. 13.

.....

At the bottom of p. 13, and extending on to p. 14 is an amendment of Section 312 suggested by the Maritime Board of Trade. Section 312 is the section of the Act that requires railway companies to provide adequate and suitable accommodation, equipment and service for the handling of traffic. The Maritime Board of Trade proposes to extend the application of these sections to express companies, and to substitute throughout the first subsection the words "transportation facility" for the word "accommodation".

Under the present Act, the sections relating to operations and equipment do not apply to express companies for the very good reason that the railway company supplies the equipment and does the operating. If, however, Section 312 is made to apply to express companies and the words "transportation facility" are inserted along with the definition of those words in the proposed subclause (f), which is on page 14, these amendments will have the ridiculous

result of requiring the express company to operate locomotives and cars although the express company in fact owns no railway upon which to operate them.

The amendments would also have the inequitable result that they would apply to the Canadian Pacific Express Company but would not apply to the Canadian National, since the Canadian National has no express company but performs its express service through a department of the railway.

It should be pointed out that while the word "accommodation" is deleted throughout Subsection (1), and the words "transportation facility" are substituted, there is no proposal to make corresponding changes in the later subsections of the same section set out on pp. 14 and 15. Consequently, in those later subsections, for example subsection (2), the references in those subsections to "such adequate and suitable accommodation" become meaningless, because there is no "such adequate and suitable accommodation" in the previous clauses to which that clause can refer back.

There is no evidence whatever before this Commission to indicate that any changes of the kind proposed are necessary, and we merely have here additional examples of the results that flow from tampering with the statute without sufficient knowledge or forethought of the results.

.....

The amendment of Section 320 on page 17 proposed by the Maritime Board of Trade has now been withdrawn by Mr. Smith, and we can omit the balance of page 14 of my notes.

THE CHAIRMAN: That is what section?

MR SPENCE: Section 320, on page 17 of the consolidation, my lord. Mr. Matheson at first proposed striking out those words at the end of Section 320, and then Mr.

Smith in the course of his argument withdrew that proposal; so I turn to the top of page 15 of my notes. I am omitting most of page 14.

I do not propose to comment at this time upon the remaining amendments contained in this consolidation. All of them have either been dealt with by Mr. Evans, or will be covered by Mr. Sinclair and myself in separate submissions. I only desire to point out that the contradictions, redundancies and absurdities of which I have spoken in respect of earlier individual amendments and combinations thereof, are even more magnified and devastating when attempts are made to tamper with such complicated sections as those relating to rates and tolls.

The Act, as it stands, is the result and essence of perhaps one hundred years of railway regulation in this country. From beginning to end, the provisions of the Act have been developed by trial and error, and from study and planning by such men as Dr. McLean and other men equally knowledgeable and experienced in the technicalities of transportation legislation.

In my submission, it would be disastrous if this Act, which is the result of all this experience and all this study, and which notwithstanding everything that the Provinces have said, is working smoothly and efficiently today, should be thrown into the discard or thrown into hopeless confusion by the amendments of the Provinces that are set out in this consolidation.

I have no intention of suggesting that we have by any means a perfect Railway Act at the present time. There is no doubt that changes should be made and will be made from time to time, but I do urge that changes should not be made in any wholesale manner or without the most serious study of all of their possible implications and ramifica-

tions. Certainly this Commission has heard many complaints from dissatisfied parties, but there are very few of these complaints that are new, or that have not been given the most thoughtful consideration through generations of the past. What this Commission has not heard is the point of view of those in all parts of the country who are satisfied with the operation of the Act as it now stands, and I venture to suggest that if the Act were to be changed in the various ways now suggested the result would be to bring up a new crop of complainants against the new system, (if it could be called that), who would be equally vociferous in demanding that the injuries claimed to have been done to them by these changes be removed.

Let us have changes in the Act, certainly, if we are sure that they are in the interest of the whole public and not merely of the few who shout the loudest; but, when we make the changes, let us be sure that they really accomplish the purposes for which they are intended.

(Page 23393 follows)

PROPOSED AMENDMENTS TO MARITIME FREIGHT RATES ACT

Before commencing my argument upon the subject of the Maritime Freight Rates Act, I propose to hand to the Commission a consolidation of the amendments to this Act that have been submitted by the parties appearing before the Commission. The consolidation has been prepared in the same manner as the one made for the Railway Act except that in the present case the entire Act has been typed.

The position of the Canadian Pacific as to the Maritime Freight Rates Act is expressed on p. 48 of Part I of the Company's main submission to the Royal Commission.

The Canadian Pacific does not propose the repeal of the Act. It does urge your Commission to recommend that the principle to which effect is given in the Act should not be extended, for reasons that are stated at pp. 48-55 of Part I of our submission.

The Act as it now stands puts into effect the findings and recommendations of the Royal Commission on Maritime claims headed by Sir Andrew Duncan. Our submission is that to the extent that the complaints of the Maritime Provinces were found to be justified by the Duncan Commission, the basis of those complaints was effectively and permanently removed by the passage of the Maritime Freight Rates Act. We submit that the purpose of the Act is being fulfilled today as completely as when it was first passed, so there is no justification for extending it.

THE CHAIRMAN: What particular extension have you in mind when you say that?

MR. SPENCE: Well, there are a number of extensions.

THE CHAIRMAN: The increase from 20 to 30%?

MR. SPENCE: That is one, my lord. Then there is a very serious extension proposed by Mr. Matheson that I will come to in a moment.

THE CHAIRMAN: Then you will deal with them all seriatum?

MR. SPENCE: Yes, my lord.

I should like to emphasize a point that in my submission is basic to the whole consideration of the Maritime Freight Rates Act, namely, that the object of the Act is purely the redress of certain particular disadvantages suffered by the Maritime Provinces because of the construction of the Intercolonial Railway upon a plan which had regard for national, imperial and strategic considerations. It is clear, from a reading of the Duncan Report that the reduction of twenty percent in freight rates recommended by that Commission was not intended to overcome any of the normal effects of geography, or any of the other factors pertaining to location that are experienced in greater or less degree by people in all parts of the country. It was related only to the additional, and what I might call artificial disadvantage caused by the fact that the railway connecting the Maritimes with the rest of Canada was considerably longer than it would have been if planned on a strictly commercial basis.

In the middle of page 23 of the Duncan Report we find the following passage:-

"Here it is enough to indicate the principle upon which we are proceeding, namely, that all arguments in connection

with Maritime rates, in so far as they rest upon national, imperial and strategic conditions, attaching to the Intercolonial Railway, can be broadly assessed on the basis of the reduction which we recommend.

"We think that this broad measuring, once and for all, of these considerations, has such decided advantages that it should not be qualified or delayed by minor criticisms. It separates completely considerations of national public policy from considerations of railway policy proper."

The first paragraph quoted is expressed in somewhat obscure language, but when it states that all arguments in so far as they rest upon these particular conditions can be assessed on the basis of the reduction recommended by the Commission - -

THE CHAIRMAN: What year was that recommended?

MR. SPENCE: 1926, my lord, I think the Duncan Commission reported.

THE CHAIRMAN: Isn't it shortly the contention of the Maritimes now that conditions have so altered since then that that particular reduction has turned out to be insufficient?

MR. SPENCE: Well, my lord, my point is this, that the reduction was made for historical reasons.

THE CHAIRMAN: I know.

MR. SPENCE: And historical reasons, reasons in the past don't change, and if 20% was adequate at that time to meet this historical disadvantage, it is still adequate.

THE CHAIRMAN: Yes, I know, but it was the

meeting of an historical disadvantage based on the cost of transportation. Now, I don't see that it necessarily follows that a particular reduction at a certain time should be final and conclusive, because conditions may alter. Now, those who contend for an increase in this reduction say that conditions have altered and that their reduction should be increased. What have you to say to that particular contention? Have conditions altered unfavourably toward them or not? Are they in a worse position now than they were?

MR. SPENCE: No, I submit not. For example, freight rates have been increased all over Canada.

THE CHAIRMAN: Yes?

MR. SPENCE: 20% of the higher freight rate is a greater advantage, at least a greater reduction in money, than 20% of a lower freight rate.

THE CHAIRMAN: I know, but what about the comparative advantage or disadvantage? Isn't it a fact that part of their contention is based upon the great number of competitive rates further east of which they have not the benefit? To make the comparison between their position and that of the other provinces in the east, is it more unfavourable than it was?

MR. SPENCE: My submission is that it is an economic factor for which the Act was never planned; the Act was never planned to cope with a situation like that, my lord, or to balance all possible economic disadvantages that might arise. For instance, Section 8 only protects against increases, at least reductions, made in other parts of the country by the railway voluntarily which do away with the Maritimes' advantages, and I am going to deal with that two or three pages later in my argument.

THE CHAIRMAN: You see, the intention of the Act is to confer advantages upon them, that is the word used.

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: In Section 8 to which you have referred.

MR. SPENCE: Advantages to the extent of 20% of the freight rates.

THE CHAIRMAN: Yes, well, the simple question is: Ought that 20%^{to} be increased?

MR. SPENCE: Well, I submit not, my lord. I am going to speak to that.

THE CHAIRMAN: Having regard to the advantages intended to be conferred by Section 8, because conditions may alter, you know, that require readjustment of advantages from time to time.

MR. SPENCE: Well, I am going to deal with that later on.

THE CHAIRMAN: Can you submit that conditions have not altered, that comparatively these people in the Maritimes are as well off today as they were?

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: When the reduction was fixed at 20%?

MR. SPENCE: Yes, my lord, I think so, so far as any purpose or design of this Act is concerned.

THE CHAIRMAN: They claim that they are not; you see, and they have given us their facts.

MR. SPENCE: Well, I propose to deal with that in a moment, my lord.

THE CHAIRMAN: All right.

MR. SPENCE: Step by step.

I suggest that this quotation from the Duncan Commission can have no other meaning than that the

proposed twenty percent reduction is an assessment of valuation of the claims made upon national, imperial and strategic considerations. This meaning is confirmed by the opening words of the second paragraph which speak of "this broad measuring, once and for all, of these considerations".

No other considerations than the national, imperial and strategic conditions attaching to the Intercolonial Railway were being measured by the Duncan Commission when it arrived at this valuation equivalent to twenty per cent in freight rates. Consequently, the words "once and for all" are significant and entirely logical. The Commission was evaluating the effect of certain disabilities brought about by actions in the past. Past history cannot be changed, and once a valuation has been made of the effects of historical facts, there is no reason for changing it.

Exactly the same attitude is expressed in the preamble that Parliament inserted in the Act when it was first passed. The preamble recites the findings of the Duncan Commission that strategic considerations determined a longer route for the Intercolonial Railway than was actually necessary, "and therefore that to the extent that commercial considerations were subordinated to national, imperial and strategic conditions the cost of the railway should be borne by the Dominion". The preamble has been inserted in the consolidation of the proposed amendments to the Maritime Freight Rates Act which I have prepared.

It will be observed that the preamble, after reciting these considerations, goes on to state that the Act is being enacted in order to give effect to the recommendations of the Duncan Commission.

Now, bearing in mind the purpose of the twenty

per cent reduction as stated by the Duncan Commission, it is evident that what Parliament intended to say to the Maritimes when it passed the Act was: "We realize the artificial disability under which we placed you when we built the Intercolonial Railway. To overcome that disadvantage we will now move you twenty per cent closer to your markets, or, in effect, we will shorten your railway mileage by twenty per cent. Now, you are on equal terms; go ahead and compete with the rest of Canada.

THE CHAIRMAN: That is the point. Are the conditions of competition the same now as they were when this was done, or have freight rates east of the Maritimes decreased in such a way, for competitive requirements or for other reasons,* that the competition is not on the same basis now as it was then?

MR. SPENCE: My lord, that is a disadvantage that any part of Canada may encounter; it is an economic change. It is not something that this Act was intended to overcome, and I deal with that when I come to Section 8. I will deal with that at some considerable length.

THE CHAIRMAN: Do you somewhere then, in dealing with it, explain to us in what regard the railways would be affected by this proposed change?

MR. SPENCE: Yes, my lord, I think that is dealt with. ~~Now~~Speaking of what you were asking a moment ago, whether the Maritimes situation has changed to such an extent that the advantages that they were granted have now been diminished, I would emphasize what is in the next paragraph in the argument.

What Parliament did not know, however, was that the 250 miles that the Duncan Commission accepted as the extra mileage in setting its valuation was much more than the difference between the distance via the

Intercolonial and the short-line mileage, so that the true result of the Act was to place the Maritimes not merely upon equal terms, but in a preferred position.

Now, even if there has been a change - -

THE CHAIRMAN: You say that the Duncan Commission proceeded then on a wrong basis of mileage?

MR. SPENCE: Yes, my lord, they accepted this 250 miles as being the difference between the Intercolonial mileage and the short-line mileage, and, as I think we pointed while we were in the Maritimes before your Commission, that was an incorrect assumption, because it took the whole of the mileage along the south shore of the St. Lawrence through Moncton and down to St. John, as the mileage to compare with the short-line mileage.

(Page 23401 follows)

That we submitted was not a proper comparison, that the real difference between the Intercolonial mileage to the average point in the maritimes and the short line mileage was only about 100 miles instead of 250 miles; so that when the Act was passed on a difference of 250 miles, it gave the maritimes greater advantage than it was really intended to give them. Even if there has been some slight variation or change in conditions, the Maritimes still have that extra gratuitous benefit that would take some considerable change in circumstances to over-balance.

The submissions now made to your Commission by the Maritime Provinces are practically all aimed at increasing their benefits beyond this preferred position with the other Provinces. Many thousands of words have been addressed to this Commission on the subject of the geographical disadvantage of the Maritimes as compared with other areas, and the assumption seems to be that this is a disability peculiar to the Maritimes alone. The Maritimes seem unable or unwilling to admit the fact that every province or community in Canada has its own geographical disadvantages as well as advantages.

Turning now to a consideration of the particular amendments set out in the consolidation, the first is the re-insertion of the preamble. We, of course, have no objection to this, particularly as under the provisions of the Interpretation Act, -- I think it is section 4 of the Interpretation Act -- the preamble still has the force of law although not copied into the Act in the Revised Statutes.

The second proposal for amendment is shown on p. 2 of the consolidation, and consists of the substitution of "thirty per cent" for "twenty per cent" in clauses 3(1)(b) and 3(2)(b). These amendments are proposed by the Province of New Brunswick and do not appear to have been fully endorsed by the other Maritime Provinces, although Prince Edward Island

has now expressed its concurrence. The amendments are, in my submission, an example of what I was speaking of a few moments ago, namely, the unjustified extension of the Act beyond what was found to be necessary by the Duncan Commission. If twenty per cent was adequate in 1927 to compensate for the historical disability resulting from the mileage of the Intercolonial Railway, it is equally adequate now to compensate for that disability. Any further percentage will be a discrimination in favor of the Maritimes; it will be a subsidy for purely geographical reasons, which is a kind of subsidy that we have never entertained in this country. If it is granted, the precedent will at once be set for claims from every other area that suffers disabilities of any kind, geographical or otherwise. That danger compels us to oppose these amendments.

^{next}
The amendment to Section 3(2)(c) shown on page 2 is proposed by the Canadian Pacific, and is to be explained by Mr. Sinclair.

The amendment is to Section 4(1)(d) shown on page 3 of the consolidation, and proposed by the Maritime Board of Trade. My understanding is that the purpose of this amendment is merely clarification of the Act, and as ~~such~~ such, the Canadian Pacific has no objection to offer although the amendment would hardly seem to be necessary. Under clause (b) of Section 4, traffic moving outward, west-bound, all rail from the Maritime Provinces to points in Canada, is brought within the category of preferred movements. We have always interpreted that section to mean that so long as the traffic moved all rail within the select territory it came within the provisions of the Act even though it might move partly by water after passing Diamond Junction or Levis. Mr. Matheson himself has stated to the Commission that the Maritimes have experienced no difficulty in this

connection.

The next amendment is to Section 4(1)(d), and it is proposed by New Brunswick. Section 4(1)(d) will be found just past the middle of page 3 of the Consolidation. This amendment is for the purpose of applying the Maritime Freight Rates Act to traffic moving into the Maritimes from other parts of Canada, and the Commission will recall that there was considerable divergence of opinion between the Maritime Provinces, as well as between shippers located in those Provinces, as to whether it was desirable to make this change in the Act. It will be noted that Nova Scotia and the Maritime Board of Trade are not supporting the amendment, and Prince Edward Island has only recently given it a belated blessing, and in these circumstances it seems doubtful that it has the endorsement of the majority. This is an extension of the Act to which we are opposed on principle.

THE CHAIRMAN: Pardon me a moment. You say there was a difference of opinion. Can you tell us who opposed the change?

COMMISSIONER INNIS: You go on to say that in one of the next sentences there.

MR. SPENCE: The stove manufacturers at Amherst, was it?

MR. SINCLAIR: Sackville.

THE CHAIRMAN: You say:

"It will be noted that Nova Scotia and the Maritime Board of Trade are not supporting the amendment."
Do you just mean that they are not saying anything about it?

MR. SPENCE: Mr. Matheson was very non-committal on the matter when he was asked. He did not come out and say "I oppose it".

THE CHAIRMAN: You speak of a difference of opinion, or a great difference of opinion. I should like to know who, if anybody, actively opposed it. Some may be uninterested, but that is a different thing from opposing it.

MR. SPENCE: At the hearings in Halifax, my lord, Mr. Matheson took the position that he would not support the amendment to allow goods into the Maritimes indiscriminately, that he would want to know what particular goods would be allowed in.

THE CHAIRMAN: Then did not Mr. Smith tell us that pig iron should be allowed in, for instance?

MR. SPENCE: I think they were all prepared to allow in certain commodities that were not competing with commodities produced in the Maritimes; but as to those who were producing commodities in the Maritimes such as stoves, for example, --

THE CHAIRMAN: Such as what?

MR. SPENCE: Such as stoves, my lord; they did not want reduced rates for similar products coming into the Maritimes to compete with their products.

THE CHAIRMAN: When you say "did not want", do you mean that they opposed it?

MR. SPENCE: I think I am safe in saying that they opposed it, my lord, in principle.

THE CHAIRMAN: It is a matter of evidence, of course, and we can find it. But since you told us that there was a great difference of opinion, I thought you might have a note there for ready reference.

MR. SPENCE: We have the Province of New Brunswick proposing this. We have the Province of Prince Edward Island now supporting it. But we have the Nova Scotia Boards of Trade not supporting it.

THE CHAIRMAN: If they are just neutral, that is one thing.

MR. SPENCE: No. They are taking a different stand in principle, my lord. They are not in favour of having the section put into the Act in this wide-open form, as it is here. In any event, my submission is --

THE CHAIRMAN: Do I understand that the Canadian Pacific Railway is opposed to this change?

MR. SPENCE: Yes, my lord. The Canadian Pacific Railway is opposed to this as an extension of the Act; and we are opposed in principle to the extension of the principle of the Maritime Freight Rates Act. All we say is that it seems doubtful that this proposal has the endorsement of the majority. It seems extremely doubtful.

THE CHAIRMAN: Would you tell us why you oppose these extensions? You said you would a while ago. That is, you are opposed to the increase of the subsidies?

MR. SPENCE: That is it exactly, my lord, yes.

THE CHAIRMAN: You are opposed then to the advantage being given to eastbound traffic?

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: You will tell us why you are opposed to it, will you?

MR. SPENCE: We say that the Maritime Freight/ ^{Rates} Act--

THE CHAIRMAN: I mean, if you do so later on, that is all right.

MR. SPENCE: I think I can say it in a few words now, my lord. The Maritime Freight ^{Rates} Act no doubt has its place for the purpose of overcoming these artificial disadvantages that were caused by the factors measured by the Duncan Commission; these strategic and national considerations that are all in the past. The Act was planned to overcome those and no other disadvantages. So long as the Act, as it

was first enacted, remains on the statute books in that form, it has the reason and the justification that the Duncan Commission found for it. But it should not be used now as an excuse for an enlargement of subsidies on geographical or economic grounds. It should not be carried any farther than it was originally intended to go; because the original plan was merely to overcome these particular factors and place the Maritimes in the same position as everyone else in Canada, to put them on a par, - it was not to put them on a par geographically of course, because it is impossible to put everybody on a geographic par, but it was to remove any disadvantage that Parliament had previously caused by the building of this line by the long route.

THE CHAIRMAN: Disadvantages based entirely upon mileage, you say?

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: And made excessive in that case by 250 miles where 100 miles would have been sufficient.

MR. SPENCE: What they say is 250 miles.

THE CHAIRMAN: That is your point of view.

MR. SPENCE: But actually it was only 100 miles. I was about the middle or near the middle of page 22 of my notes.

The amendment to Section 5(b) proposed by New Brunswick follows from and depends upon the amendment to 4(1)(d), and I need not refer to it further.

As to the repeal of Section 6 proposed by the Canadian National, this is a matter that does not concern the Canadian Pacific and I have no comments.

On p. 4 of the consolidation there are two amendments of Section 8 that are of serious importance. The first of these is proposed by the Maritime Board of Trade and the

Provinces of Nova Scotia, New Brunswick and Prince Edward Island; the new subsection (2) of Section 8 is proposed by the Maritime Board of Trade alone.

Section 8 as it stands refers to the purposes of the Maritime Freight Rates Act and provides for the protection of the advantages granted by the Act by prohibiting approval of tariffs which may destroy or prejudicially affect these advantages in favor of persons or industries located outside of the Maritimes. The two amendments now proposed require very careful study, because their effects would be much more extreme than would at first glance appear.

We must begin with the principle of the present Section 8 that tariffs applicable anywhere in Canada that destroy or prejudicially affect the established Maritime preferences are not to be allowed by the Board. To that we must add the fact that outside of the select territory, and particularly in Ontario and Quebec, truck competition exists which depresses certain of the rates in those areas, whereas there is no appreciable truck competition along the route from the Maritimes to Central Canada.

This leads to the question - and this is the question your lordship asked a moment ago -- whether the truck competitive tariffs in effect in Ontario and Quebec may be disallowed under Section 8 as tariffs which may destroy or prejudicially affect the Maritimes advantages. In the so-called Potato Case (46 C.R.C. 161), that is in the year 1937, my lord -- the Supreme Court of Canada held that competitive tariffs established outside of the select territory were within the contemplation of Section 8 but that whether any particular competitive rate may destroy or prejudicially affect the statutory advantages was in each case a question of fact to be determined by the Board. The Court held further that the authority of the Board under Section 8 was

limited by the words "shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages". In other words, the Board did not have the power, upon reaching a finding of prejudice, to reduce the Maritime rate instead of disallowing the competitive rate.

THE CHAIRMAN: What happened in the result? What happened to these particular tariffs?

MR. SPENCE: They were not disallowed, my lord.

THE CHAIRMAN: They were maintained?

MR. SPENCE: They were maintained; yes, my lord.

It is to be noted that in the judgment of the Board that led to this appeal (44 C.R.C. 289; 1936), there was a finding of fact that the competitive rates on potatoes in force in Ontario did not destroy or prejudicially affect the advantages provided to shippers in the Maritimes. One of the reasons that the Board gave for arriving at this conclusion was that cancellation of the competitive rates would only result in depriving the railways of their traffic, which would then be carried by truck. Another reason was that the shipments of potatoes from the Maritimes during the time that these rates were in effect had actually shown a substantial increase.

(Page 23410 follows)

THE CHAIRMAN: Did you say that the Board found that as a reason?

MR. SPENCE: Yes.

THE CHAIRMAN: That the price of potatoes --

MR. SPENCE: The quantity, the number of carloads of potatoes shipped.

THE CHAIRMAN: The quantity.

MR. SPENCE: The quantity shipped, yes, my lord.

Since disallowance of the competitive tariffs is of no value to the Maritimes when the only result will be the transfer of traffic to trucks at the same rates, the Maritime Provinces are now attempting to achieve their object from the other direction by forcing down the rates from the Maritimes, or in other words, by extending the preferences which they are granted by the Act.

THE CHAIRMAN: That is from 20% to 30%?

MR. SPENCE: That is this proposal.

THE CHAIRMAN: What do you mean by "extending the preferences"?

MR. SPENCE: By their proposal for amendment of Section 8.

THE CHAIRMAN: You have not told us what that amendment is.

MR. SPENCE: Instead of compelling the railways to cancel their competitive rates in Ontario and Quebec they want their own rates from the Maritimes to Ontario and Quebec reduced.

THE CHAIRMAN: What does the proposed section say?

MR. SPENCE: It is at the bottom of page 4, my lord. The first part is an addition to subsection (1) of section 8. It reads:

" . . . and the Board is authorized and directed to adjust or vary tolls or rates subject to this

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Act from time to time as may, in the opinion of the Board, be necessary to maintain the said statutory advantages in rates when there have been reductions in tolls or rates elsewhere than in such select territory."

Then the Maritime Board of Trade proposes to add a subsection (2) reading:

"Tolls established from points in the select territory to points in Canada outside such territory to meet market competition shall not be deemed to be unjust^{ly} discriminatory within the meaning of the Railway Act."

I shall deal with that subsection in a moment.

There are several points to consider in relation to this proposal.

THE CHAIRMAN: That is the first proposal?

MR. SPENCE: Yes, my lord.

The first is that the situation does not arise out of any voluntary action by the railways; it comes about from an immovable economic fact, the existence of trucks in Central Canada. If the cause of the condition were merely the action of the railways in establishing depressed rates in Ontario and Quebec, it could readily be overcome by a disallowance of those rates under the present Section 8. The fact is, however, that the root of the matter of which the Maritimes complain, is this existence of truck competition, which reacts in exactly the same way upon the Maritimes as would, for example, an exceptionally heavy potato crop in Ontario and Quebec, or a surplus of cheap labour in those provinces, or the availability in Ontario and Quebec of quantities of low-priced fertilizer for the potato crops.

Now, these are not factors of a kind that the

Maritime Freight Rates Act even pretends to cope with. As I said before, the whole purpose of the Act is expressed in the present Section 8, and it will be seen that that Section deals with nothing else but railway rates and railway tariffs.

"The purpose of this Act is to give certain statutory advantages in rates."

"The Board shall not approve nor allow any tariffs which may destroy or prejudicially affect."

The statutory advantages in rates have been given by the twenty per cent reduction required under Section 3. The Board disallows any tariffs that of themselves are prejudicial to these advantages; but when situations arise that are not in any way caused by rates or tariffs or actions of the railways, they are entirely outside the scope of the Act, and to attempt to use the Act as an instrument for overcoming this type of adverse situation would be, in my submission, a most undesirable and dangerous extension of its purposes.

This is exactly what the Maritime Provinces have attempted to do by the clause added to subsection (1) of Section 8. By authorizing and directing the Board to adjust or vary Maritime rates "when there have been reductions in tolls or rates elsewhere than in such select territory", the real purpose is to require reduction in Maritime rates even when it cannot be established that the reductions elsewhere have any prejudicial effect. If this were not so, there would be no need for the amendment because in that event the prejudicial rates could be cancelled under the present Section 8. Thus, the Maritimes are by this amendment attempting to enlarge their preferences under the Act.

I suggest, however, that it is very doubtful that the amendment would bring the result anticipated by the

Maritime Provinces. It will be noted that the Board is only to be authorized and directed to take this action when in the Board's opinion, it is "necessary to maintain the said statutory advantages in rates". I suggest that in a situation such as I have outlined, the statutory advantages granted by the Act would remain undisturbed and unaffected, so that it would not be necessary for the Board to take action at all to adjust or vary the Maritime tolls. The aim of the Maritimes seems to be, first to force the railways to meet the competition in the central provinces by reducing their rates of course, and then to try to derive an advantage from the fact that the railways have done so.

COMMISSIONER ANGUS: How could they force them to meet competition in the central provinces? Is there anything in the proposed amendment?

MR. SPENCE: Perhaps I should not have said "force" them to. This only takes effect when the railways have reduced their rates. They certainly want the railways to reduce their rates in the central provinces so that their proposed amendment will take effect and allow their rates to be reduced.

COMMISSIONER ANGUS: Unless the railways reduce their rates in central Canada the low trucking rates in central Canada would create the very type of disadvantage the Maritimes are complaining of.

MR. SPENCE: Exactly.

COMMISSIONER ANGUS: And with no redress.

MR. SPENCE: I come to that very point.

Let us suppose, for example, that when truck competition became pressing in Ontario and Quebec, the railways did not reduce their rates, but instead allowed the trucks to take the business; or let us suppose

alternatively that the railways, having put in truck competitive rates, cancelled them.

COMMISSIONER ANGUS: As I see it, the point is that the Maritimes would not get the full advantage unless they could force the railways to meet competition in central Canada, and they have done nothing in the proposed amendment to force the railways. Yet you say that is their object or aim.

MR. SPENCE: They do not accomplish that end in their amendment, and their amendment would only take effect when the railways had.

THE CHAIRMAN: I want to make sure that I understand what you mean. You say:

"The aim of the Maritimes seems to be, first to force the railways to meet the competition in the central provinces . . ."

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: That is, to force you to meet truck competition; is that it?

MR. SPENCE: Their amendment will only take effect when we meet truck competition.

THE CHAIRMAN: And in that case --

MR. SPENCE: In that case their rates, according to their amendment, would be reduced. On the other hand, if we did nothing then potatoes in Ontario and Quebec would be carried at the same rates by the trucks.

THE CHAIRMAN: Do they ask you to do anything in that case?

MR. SPENCE: No, they do not. If we do not reduce our rates, if we just let the business go then they are in exactly the same position so far as their potatoes to Ontario and Quebec.

THE CHAIRMAN: They do not ask to have anything

done about that.

MR. SPENCE: No. I think my word "force" is incorrect, as Commissioner Angus has pointed out. Their aim is when the railways have met the competition in the central provinces to try to derive an advantage from the fact that the railways have done so.

THE CHAIRMAN: They say if you meet the competition then attend to us.

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: And if you do not then there is no claim against you.

MR. SPENCE: They have no claim against us.

THE CHAIRMAN: Any claim they might have would be against the truckers.

MR. SPENCE: Yes, and they are unable to make any claim against the truckers. Therefore they are in exactly the same position whether the railways reduce their rates or do not. As I say in the middle of that paragraph, in either of those cases, the position of the Maritimes would be exactly the same as if the competitive rates were actually in effect, but there would be no action for the Board to take.

As Mr. Evans points out to me, my lord, perhaps I was right in using the word "force" after all. The Maritimes are not satisfied to have the competitive rate cancelled. Therefore if the rate was disallowed they would still want to have the advantage.

THE CHAIRMAN: Exactly what did they ask to have done in the case you have referred to?

MR. SPENCE: In the potato case they asked to have their own rates reduced.

THE CHAIRMAN: Because of the competition?

MR. SPENCE: Because of the competitive situation.

COMMISSIONER ANGUS: Would it solve any difficulties

if you said, "Force the railways to continue to meet"?

MR. SPENCE: Yes, I think that would cover it.

THE CHAIRMAN: Of course you are reading this aim of theirs out of the proposed amendment. You say "the aim of the maritimes seems to be". When you say that you refer to the amendment?

MR. SPENCE: I am reading that from their amendment.

THE CHAIRMAN: What does the amendment say?

" . . . and the Board is authorized and directed to adjust or vary tolls or rates subject to this Act from time to time as may, in the opinion of the Board," and so on.

MR. SPENCE: Yes.

THE CHAIRMAN:

" -- be necessary to maintain the said statutory advantages in rates when there have been reductions in tolls or rates elsewhere than in such select territory."

If there have not been reductions elsewhere then the amendment would not come into operation at all?

MR. SPENCE: No, my lord. Actually, of course, what they are complaining of is that there have been all these reductions that we have been compelled to make in the central provinces.

THE CHAIRMAN: I do not see how they are forcing you to reduce rates in the central provinces. They say if you reduce rates there then you must do the same thing for them.

MR. SPENCE: We have reduced these rates, my lord, and now that we have they want their rates reduced.

THE CHAIRMAN: How can you say that the Maritimes forced you to do so? You did it yourselves to meet truck

competition.

MR. SPENCE: They do not want us to take the rates off again.

THE CHAIRMAN: They say if you give those rights in the central provinces then give us similar reductions.

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: It seems to me they say nothing as to what should happen if you do not grant competitive rates outside of the area.

MR. SPENCE: If their rates are reduced and then we cancel our competitive rates in Ontario and Quebec they would still have the advantage.

THE CHAIRMAN: Have what?

MR. SPENCE: They would still have the advantage.

THE CHAIRMAN: Yes; you are not asked to ^{their} reduce/rates until you have first dealt with rates in that way outside of their territory. As I understand it that is the only time you do that.

" . . . to maintain the said statutory advantages in the rates when there have been reductions in tolls or rates elsewhere than in such select territory."

(Page 23420 follows)

MR SPENCE: The Maritimes have said that they are not content just to have these rates removed, these competitive rates removed. They want their advantage increased by this section.

THE CHAIRMAN: Oh, yes. I suppose they want to remedy what the judgment of the Supreme Court said they could not have.

MR SPENCE: Yes, my lord. They do not just want us to cancel our rates.

THE CHAIRMAN: I say that the whole thing does not start at all until you have first reduced your rates west of their areas.

MR SPENCE: No, it does not, my lord; but the fact is that we have, of course, reduced our rates now. Now they say, "We are not content to have you take those rates out again."

THE CHAIRMAN: No.

MR SPENCE: "But we want our advantage increased because of those rates, and no matter what you do with them in the future, whether you cancel them or not, we want our rates reduced."

COMMISSIONER ANGUS: Would you read the amendment in that way, Mr. Spence? Suppose that in Ontario the railway has for competitive reasons reduced the rate on potatoes to meet truck competition, and suppose that this amendment were in effect, and therefore a similar reduction had to be made on the rate on potatoes from the Maritime Provinces into Ontario; now suppose that the railways found that the competition was no longer as keen as it had been and that they could raise their competitive rate or even cancel it; do you mean that under this amendment the lowered rate from the Maritime Provinces would continue after the cancellation of the competitive rate in Ontario?

MR SPENCE: I think it is very doubtful, Dr. Angus.

THE CHAIRMAN: Well, the opinion of the Board is inserted there, you see; we must remember that.

MR SPENCE: Yes. They argue for it, they ask for it. Once the rate goes down it is not to be raised again, their own rate; and you see at the end of this---

THE CHAIRMAN: Pardon me. Does it not say such variation "as may, in the opinion of the Board, be necessary to maintain the said statutory advantages"?

MR SPENCE: Oh, yes. It would lead to a case before the Board, undoubtedly, and probably before the Supreme Court, if that situation occurred. But it says, "where there have been reductions in tolls or rates elsewhere than in such select territory." Now, it is just arguable as to which way that would be interpreted. I do not think that they have really accomplished the result that they set out to accomplish by their wording of this section, but I will deal with that in a moment.

But my submission is that it is only the "said statutory advantages" that are to be maintained under the Act; that is, the particular statutory advantages granted under Section 3, and they can only be maintained against voluntary and arbitrary action of the railways in the changing of rates, not against economic considerations that are not caused by rates at all, such as the existence of trucks in the Central Provinces.

While the amendment to subsection (1) is proposed by the Maritime Board of Trade and the three Maritime Provinces, it is to be observed that subsection (2) is proposed only by the Maritime Board of Trade, although I suggest that the amendment to subsection (1) would be unworkable without subsection (2). I say that for this

reason, that there is no truck competition between the Maritimes and the Central Provinces that would justify or compel a lowering of the railway rates. In the absence of the competitive factor, the reduction of rates from the Maritimes under the amendment to subsection (1), would be an unjust discrimination within the meaning of The Railway Act, so that the rates would either have to be cancelled or a reduction on the same basis would have to be granted to all shippers outside of the select territory against whom the discrimination operated.

THE CHAIRMAN: Pardon me. I want to make sure I follow you. You say "so that the rates would either have to be cancelled" -- what rates?

MR SPENCE: The rates from the Maritimes to the Central Provinces would be normally unjustly discriminatory rates if they were reduced to a competitive basis without any competition to justify them; so that either they would not be allowed to remain since they were unjustly discriminatory, or else all other rates to shippers against whom the discrimination operated would have to be reduced to the same basis. That is the purpose of adding subsection (2).

COMMISSIONER ANGUS: Would section 7 possibly preclude that result? " . . . the tariffs of tolls, in this Act provided for . . . shall be deemed to be statutory rates, . . . "

MR SPENCE: I hardly think so, Dr. Angus. I mean, section 7 is not intended to legalize rates that would be unjustly discriminatory except on the broad basis of the 20 per cent reduction. I think that if a special reduction were put in to meet a competitive rate in Central Canada, there would certainly---

THE CHAIRMAN: Don't you think that really that

amendment is meant to leave it with the Board all the time to see to it that the advantages of the Act are maintained, that is all? The Board may make such variations "as may, in the opinion of the Board, be necessary to maintain the said statutory advantages in rates".

MR SPENCE: Well, the Board is directed to adjust.

THE CHAIRMAN: Yes, "the Board is authorized and directed to adjust or vary tolls or rates subject to this Act from time to time" -- there again you have it -- "as may, in the opinion of the board" -- you say directed, but then it depends on their own opinion -- "as may, in the opinion of the Board, be necessary to maintain the said statutory advantages in rates" -- that is the statutory advantage already given in the preceding words of the section -- "when there have been reductions in tolls or rates elsewhere than in such select territory." Well, I imagine if you alter that language to read, instead of "have been", "where there are in existence reductions in tolls or rates elsewhere than in such select territory", you will get at what they really mean, won't you?

MR SPENCE: It may be; and yet there have been expressions of opinion to the contrary by some of the witnesses. But I do suggest that---

THE CHAIRMAN: They can tell us themselves what they really mean.

MR SPENCE: The addition of that section does not accomplish what it starts out to accomplish, and I am going to refer to that in a moment in my argument. It really does not change the situation, or would not in effect change the situation as much as it is designed to do.

I was dealing with subsection (2) and pointing out

that the purpose of that subsection was to overcome the argument that rates established under subsection (1) would be unjustly discriminatory rates, and at the bottom of page 10 of my notes I say:

To overcome this difficulty, Mr. Matheson has proposed subsection (2) to Section 8. In preparing this subsection, he has evidently been confronted with the difficulty that he could not call the rates truck competitive, because there is no truck competition. He has, therefore, been obliged to resort to the device of naming them market competitive rates which, of course, they are not. The railway does not grant rates to a shipper on one of its lines to enable him to meet market competition of a shipper on another of its lines. That would be unjust discrimination prohibited by The Railway Act. To term such rates market competitive, if such rates were normally possible, would be a misnomer, and I do not know of any other name that could be given to them but discriminatory rates.

THE CHAIRMAN: Are you quite sure of what you say there? "The railway does not grant" -- I am putting it this way: do you say the railway cannot grant rates to a shipper on one of its lines to enable him, that is to say, which would have the effect of enabling him, to meet market competition of a shipper on another of its lines?

MR SPENCE: No, my lord. Supposing the railway has two branch lines leading into a market, and we have a shipper on one line and a shipper on the other line; if we reduce shipper A's rates, then we must reduce shipper B's rates on the same basis, otherwise we are giving an unjust discrimination.

THE CHAIRMAN: Although they are on different lines.

MR SPENCE: Although they are on different lines.

THE CHAIRMAN: Now, if those two lines belong to different railways, then what would happen?

MR. SPENCE: Well, in Canada we would never do that. The Canadian National and the Canadian Pacific touch practically all uniform---

THE CHAIRMAN: It has been held, has it not, in the United States that in that case the rule of discrimination does not apply?

MR SPENCE: Between railways in the United States there are market competitive rates put in, yes, but not in Canada, my lord.

THE CHAIRMAN: None at all in Canada?

MR SPENCE: I do not think so, my lord.

THE CHAIRMAN: But there could be, could there not? There could be?

MR SPENCE: I think theoretically it is possible, yes. If you have one exclusive Canadian National point and another exclusive Canadian Pacific point running into a common market, I think theoretically it is possible, but it is not done.

THE CHAIRMAN: You do not compete that way with each other.

MR SPENCE: We do not compete that way with each other.

THE CHAIRMAN: But there is nothing to prevent you?

MR SPENCE: The main reason, of course, is that the Canadian National and Canadian Pacific serve almost every point together, and if the Canadian Pacific put in a rate from point A to the market to compete with a shipper at point B on the Canadian National to that market, the Canadian Pacific and Canadian National probably both serve both point A and point B, and one of them would be giving

an unjust discrimination, because one would have to meet the rate of the other. There would be endless complications of that kind, and it just is not feasible to put in market competitive rates in Canada as between the railways.

COMMISSIONER INNIS: Does not that point to one of the very great disadvantages in Canada which follows from a system of two railways as compared with the United States? There is no way in which you can take advantage of market competition such as exists in the United States.

MR SPENCE: Nobody has a right to have a competitive rate.

COMMISSIONER INNIS: Market competition does mean intensive industrial efforts to get into different markets from different producing regions. Now that there are only two railways in Canada, Canada is practically precluded from the advantages of that type of market competition. I am just asking whether there is any way around the sort of disadvantages under which Canada must continue with two railways.

THE CHAIRMAN: Well, we can deal with that when we come back.

(Recess)

MR SPENCE: On Dr. Innis' question, I would like to point to Dr. Locklin's book at page 544, where he quotes with approval Commissioner Eastman. Dr. Locklin says:

"This is what Commissioner Eastman had in mind when he said, ' . . . the theory of market competition, if followed consistently, will inevitably lead to all manner of cross-hauling and wasteful transportation for which the country must in the end pay.

THE CHAIRMAN: That is Locklin at what page?

MR SPENCE: At page 544.

THE CHAIRMAN: About that proposed amendment, let us get back to it. It was Mr. Matheson who suggested the complaint that led to it. What was the complaint again?

MR SPENCE: The complaint was that the Supreme Court had confirmed the Board's ruling that the competitive rates in Ontario and Quebec---

THE CHAIRMAN: Pardon me. I am dealing with the proposed subsection (2).

MR SPENCE: On subsection (2)? Well, the difficulty that Mr. Matheson encountered there was that if his amendment to subsection (1) was adopted, and rates from the Maritimes were reduced without any competition along the line from the Maritimes to the Central Provinces to justify the reduction, then those would be unjustly discriminatory rates as against other parts of the country---

THE CHAIRMAN: Other parts of the Canadian National system.

MR SPENCE: Yes, outside the select territory; and there had to be then some clause put in to say that those should not be deemed to be unjustly discriminatory rates. Now, he could not call them---

THE CHAIRMAN: Did he have any particular instance before him in his evidence as to where the Maritimes were suffering and that suffering could be relieved by a clause of this sort? I do not remember; I think he did have something, but I do not remember.

MR SPENCE: I do not think he gave any examples, my lord. He just said, "Here is the situation. The rates are reduced in Ontario and Quebec, and so we want our rates reduced too," and the Supreme Court has said that the Board has no power to reduce those rates because no disadvantage has been shown.

THE CHAIRMAN: I have an idea that you are mixing two questions there which lead up to it separately. The first suggested amendment does cover the case you have in mind, but I think apart from that and beyond that he wished to have this right -- you remember, he wished the Canadian National Railways to be split in two.

MR SPENCE: Yes, my lord.

THE CHAIRMAN: And the Intercolonial brought back as a separate railway as it used to be.

MR SPENCE: Yes, he would have a separate railway putting in these rates.

THE CHAIRMAN: And the Intercolonial then along its course could grant lower rates than would exist on the other parts of the Canadian National, and therefore they would not be discriminatory, because they would be on different lines of railway. Now, he had that in mind; he had in mind the establishment along the Intercolonial of lower rates than on the other Canadian National lines running through the select territory.

MR SPENCE: Yes, my lord.

THE CHAIRMAN: But did he give any specific portion of the territory that he thought should be favoured that way? I do not remember. He must have.

MR SPENCE: Well, he said at one time he wanted to go to Toronto, and then I remember during the course of Mr. Smith's argument a few days ago---

THE CHAIRMAN: You have not looked up his evidence in that respect?

MR SPENCE: I have been through his evidence pretty carefully, my lord, several times. I do not recall any specific example that he gave. I think he just said in general---

THE CHAIRMAN: Well, he laid a great deal of stress

on this, I remember, and could see no other way out of it than, as I said, disrupting the Canadian National Railways; so in his mind there was some hardship there that should be met, and this would be one way of meeting it, you see, just as effective as----

MR SPENCE: As splitting up the railway, yes, my lord. As Mr. Smith said in his argument, Mr. Matheson was doing it the hard way before, but now he has discovered this method.

THE CHAIRMAN: The easy way. I think probably I was responsible for suggesting to him that an amendment to the Act would do it; it would, too. The thing is, has he shown facts which would justify such a radical amendment? That is the point -- or is it all purely theoretical?

MR SPENCE: Well, I think that he just stated the proposition, that if the Canadian National granted low rates from the Maritimes to the central territory, then if the Canadian National was granting higher rates from other points to the central territory they would be held to be unjustly discriminatory.

THE CHAIRMAN: Yes, I know what he said, but I am trying to---

MR SPENCE: I do not think he gave a particular example.

THE CHAIRMAN: ---ascertain what particular hardship he was seeking to remove by this amendment; but the evidence will show. We will have to go into that carefully.

MR SPENCE: I think that he related everything back to the potato case; it all sprang from that.

THE CHAIRMAN: It was just purely theoretical, then, according to your recollection?

MR SPENCE: Except for his prime example, the

potato case.

THE CHAIRMAN: All right, we will go on.

COMMISSIONER INNIS: Coming back to this, I am not much impressed with that quotation from Locklin. It seems to me it does perhaps describe a situation in the United States which results in all sorts of cross-hauling and perhaps over-development of market competition, but it does not seem to me that it throws much light on the inability to develop market competition on almost any scale in Canada; but that is a little aside from your main point.

MR SPENCE: Well, I think it is fair to say that no one has a right to a competitive rate. Competitive rates are put in only where they must be put in by the railways to preserve their traffic or preserve some portion of their revenue, and if the two railways in Canada went in for competing between themselves in that way there would be an economic waste; somebody else's rates certainly would have to go up.

COMMISSIONER INNIS: Well, I am thinking of the producing areas and the possibility of enabling various producing areas to get into different markets and the economic advantage which comes presumably from opening up new production centres.

MR SPENCE: Well, they can do that now. The railways are very quick to recognize the possibilities of new traffic.

COMMISSIONER INNIS: But then they are checked by this matter of discrimination.

MR SPENCE: Well, when they do find an area that is going to give them a substantial amount of traffic they are quite willing to give rates that will allow that traffic to get into the market, but they must give just and reason-

able rates to everyone, and they cannot discriminate.

COMMISSIONER INNIS: You are caught on the limitations imposed by the Board. What I am wondering about is whether the railways or whether the railways and the provinces see any way of getting around this difficulty which seems to be peculiar to a country which has two railway systems only.

MR SPENCE: I do not think that anyone suffers by the fact that we have two railway systems only. I think that the two railway systems do encourage wherever possible the opening up of new productive areas, but the Railway Act will not allow them, of course, to unjustly discriminate in favour of those areas.

I think I was at about the middle of page 27 of my notes:

Subsection (2), therefore, provides that the rates to be established for the benefit of the Maritimes, which would normally be unjustly discriminatory, shall by statute, be deemed not to be unjustly discriminatory. I submit that statutes should not be passed for the purpose of legalizing injustices.

I would like to draw attention also to the way in which subsection (2) of Section 8 is framed. While it may have been the intention to have it apply only to tolls adjusted or varied under the preceding amendment, so that it would only apply to that proportion of the through rate applicable to the distance within the select territory, nevertheless, it will be recalled that Mr. Smith when questioned upon this point by Dr. Angus at pp. 22661 and 22665 of Vol. 126, admitted that under this amendment a market competitive rate could be established to Vancouver that was extremely low, and the railways could expect to

get back from the Government the difference between that low rate and the full rate to Vancouver. When it was suggested by the Chairman that some limitation should be placed upon the distance for which the subsection should be applicable, Mr. Matheson suggested Windsor, Ontario.

Now, if that is the proposal, it will be seen what a tremendous enlargement of the advantages is being put forward here. Apparently, Mr. Smith and Mr. Matheson believe that subsection (2) would allow the whole rate, as far as Windsor, Ontario, not only that portion of it ending at Diamond Junction, to be reduced. It would permit the rate to be reduced not merely by twenty per cent, but by any percentage necessary "to meet market competition", and if Mr. Smith's interpretation at p. 22661 is correct, the railway could, under the later amendment proposed under subsection (4) of Section 9, recover reimbursement for the difference between the normal toll to Windsor and the market competitive toll established under Section 8(2).

I doubt very much that Section 9(4) would be interpreted in this way since it would be in the midst of a series of subsections dealing with reimbursement for tolls charged within the select territory. Nevertheless, it is interesting and perhaps rather startling to observe what is in the minds of Mr. Smith and Mr. Matheson in proposing these amendments.

It is also possible that if Section 9(4) confined reimbursement for market competitive rates to that portion of the rate applying to the select territory, and on the other hand, Section 8(2) required competitive rates to be put in for the full distance, the railways would themselves be saddled with the difference. In other words, they would not be able to obtain reimbursement for the balance of the amount they had reduced the rate outside the select

territory.

I do not think that I need to add any further comments upon the new subsection (4) to Section 9. It follows from the proposed Section 8(2), and as my submission is that the amendments to 8(1) and 8(2) should be rejected, so also should this. All three of these amendments are intended to give the Maritimes an additional preference. The Maritimes, having had their historical advantage more than neutralized by the Act, now want their geography and their economics neutralized as well. They want a subsidy because there happen to be trucks in other areas. They want their already sub-normal transportation rates to be doubly depressed because somewhere else the railways have been forced to give ground in the fight for traffic. Such treatment would be unjust discrimination in their favor as against all other parts of the country.

As a final word upon these amendments to Section 8 and Section 9(4), I would like to refer back to the passage near the end of the preamble, which says,

"And whereas it is expedient that effect be given to such recommendations, in so far as it is reasonably possible so to do without disturbing unduly the general rate structure in Canada."

That is a clear expression of principle that the Act is not to be permitted to disturb the rate structure unduly, and I ask what could be more disturbing to the rate structure than to allow one section of the country to ship into a common market at so-called market competitive rates, while denying that right to others, or to compel the railways to reduce their rates to the level of truck competitive rates where there is no truck competition?

The new subsections (6) and (7) to Section 9 proposed by the Maritime Board of Trade and set out on pp. 5

and 6 respectively of the consolidation, are to be covered by some remarks of Mr. Sinclair, and I need not refer to them.

As to the new subsection (8) of Section 9 proposed by the Maritime Board of Trade to permit through traffic between Saint John and Digby to be treated as all-rail traffic, the Canadian Pacific does not object to this proposal.

(Page 23435 follows)

MR. SPENCE: Now, the next two subjects - -

THE CHAIRMAN: Pardon me a moment, through traffic between St. John - -

MR. SPENCE: That is over - -

THE CHAIRMAN: Isn't it now treated as all-rail traffic?

MR. SPENCE: No, my lord, it is carried across from St. John to Digby by the Canadian Pacific steamship Princess Helene, and that is not car ferry.

THE CHAIRMAN: But under a tariff which is not the same as the rail tariff?

MR. SPENCE: No, it is partly by water, you see, and Section 3 of the Act says "all-rail traffic", and it is not brought under the benefits of the Act.

THE CHAIRMAN: Yes, Mr. Friel?

MR. FRIEL: Your lordship asked me what position the Canadian National took in that regard. This might be a good place to put on the record that we have no objection to that amendment.

THE CHAIRMAN: So you are both agreed?

MR. SPENCE: Now, the next two subjects in my notes are "Reparation" and "Canadian National-Canadian Pacific Co-operation". Our position is already clearly on the record and our submissions are collected here in an orderly form with some new submissions added.

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R E P A R A T I O N

Several representations have been made to this Commission by Boards of Trade and other bodies including the Canadian Manufacturers' Association, that the Railway Act should be amended to allow reparations to be awarded by the Board of Transport Commissioners.

Basically, the power to award reparation in respect of rates is the power to hold that rates contained in the tariffs in force have been unjust and unreasonable for a period extending back into the past. Upon a finding to this effect the regulatory tribunal then orders reimbursement, in respect of traffic that has already moved, of the difference between the charges that were actually made and the charges that would have been made if the rates that it now holds to be just and reasonable had then been in effect.

This power is not now held by the Board of Transport Commissioners, although it is held by the Interstate Commerce Commission.

Our submission is that the introduction into Canada of such a principle would be a retrograde step and would be most undesirable not only from the point of view of the railways, but also from the point of view of the shipping public. In this view we are supported by the Province of Manitoba, as will be seen from the statement of Mr. Shepard at p. 15835 of Vol. 79, that Manitoba is opposed to the introduction of reparations.

In our submission, the introduction of legislation authorizing reparation would require a major and undesirable change in the principle of the Railway Act; it would transform the Board into a court for the hearing of damage actions; it would increase railway costs without a

compensating benefit to shippers; it would encourage the development of parasitical claims agencies, and it would induce pressure upon the railways from large shippers with the object of compelling the railways to grant discriminatory rebates.

These results have in fact taken place in the United States due to the existence of the reparation system.

Under the Railway Act, the Board has no power to make retroactive orders. The Board itself has made this clear in many judgments and has always been very careful to avoid decisions that would have a retroactive effect. In our submission, this is a proper and desirable situation.

The Board is not organized and equipped in such a way that it can deal effectively with claims that would be, for all practical purposes, the equivalent of actions for damages. We have in this country an efficient organization of courts that are readily available for the hearing of such cases, and it should not be for the Board, which already has its time and energies fully occupied in the administration of basic principles of the Railway Act, to be encumbered with claims which, as I said before, really amount to actions for damages.

Because of the way in which the Railway Act is planned, no injustice arises out of the absence of retroactive powers in the Board. There is a basic difference between the methods used in Canada and the United States in establishing just and reasonable rates. In Canada the Standard Mileage Rates, which might be called the ceiling rates, are examined and passed upon by the Board before they are allowed to go into effect. Thus, no rate can ever be charged in Canada that is not at or below this just and reasonable ceiling that has already been scrutinized by the Board. Therefore, even if the Board were empowered to make

retroactive orders it could never make a finding that a rate that had been charged in this way within the limits of its approval was an unjust and unreasonable rate.

I should perhaps make it clear that I am not suggesting that every rate that goes into effect in Canada has been examined by the Board and found reasonable. Obviously, this would not be correct, but what I do say is that every rate, though not individually examined by the Board, is within the just and reasonable maximum limit that the Board has established.

In the United States this is not so. Under the Interstate Commerce Act, there is no ceiling approved by the Commission such as our Standard Mileage Rates. The rate put into effect in the United States is not necessarily determined beforehand by the Interstate Commerce Commission to be within just and reasonable limits, nor is its justness and reasonableness likely to be examined until a complaint is lodged with the Commission. Consequently, there is a possibility in the United States that an unjust and unreasonable rate may have been in effect for some time before it is questioned, and in those circumstances it is perhaps more understandable that the tribunal should have power to award reparation.

I do not suggest that in Canada a rate can never become unjust and unreasonable due to changing conditions, but I do submit that under the Canadian system with its safeguards against putting unjust and unreasonable rates into effect in the first place, there is far less likelihood of any injustice occurring to a shipper than under the United States system that has no such safeguards. Under the Canadian system a rate put into effect below the ceiling set by the Board is presumed to remain just and reasonable until it is proved otherwise. In the United States there

is no certainty that a rate charged yesterday or six months or two years ago was the proper rate to charge, unless it happens to have been passed upon by the Interstate Commerce Commission.

If a rate starts off as a just and reasonable rate, as it does in Canada, it is likely to remain so, subject of course to such general changes in conditions as will affect all rates and result in general rate revisions.

It is interesting to observe that in the United States if a rate has in fact been found by the Interstate Commerce Commission to be just and reasonable, the Commission arrives at exactly the same point as the Canadian Board. For example, in the case of Arizona Grocery Company v. Atcheson, Topeka & Santa Fe Railway Company, 284 U.S. 370; 76 Lawyers' Edition 348, which is cited in Part II of our brief at p. 109, it is made clear that the right to have reparation awarded does not exist if the regulatory tribunal has previously approved the rate, even though the Commission might afterwards change its mind and fix a lower rate for the future.

Thus, even under the United States system, once a rate has been fixed within just and reasonable limits, reparations will not be awarded. In Canada, the same result is accomplished by having all rates fixed in the beginning within just and reasonable limits prescribed ^{by} the Board. If the Interstate Commerce Act contained a section equivalent to Section 330 of the Railway Act, which is the section requiring Standard Mileage Rates to be subject to the approval of the Board, it is clear under the Arizona Grocery case decision that no reparations would ever be awarded in rate cases.

It is also to be observed that even under the United States system there are still further limits imposed upon the application of the reparations principle. For

example, no reparation is awarded in cases involving a general adjustment of rates, nor are they awarded in discrimination cases unless the rate complained of is itself found to be unreasonable. Reparations do not follow a reduction in a classification rating except in unusual circumstances, and the Commission has held that rates found unreasonable for the future are not necessarily a proper standard for the past. These limitations and various others are listed with reference to the cases in which they have been established, at pp. 111 and 112 of Part II of our brief, and I do not take time to repeat the citations here.

One of these limitations that is of particular interest, is that pertaining to discrimination cases. The Commission has refused to award reparation in these cases upon the principle that while there may be an injustice to a shipper by reason of the fact that his rate is higher than his competitor's rate, there is no justification for awarding reparation if the shipper's rate is in itself just and reasonable. This appears to be a proper and logical principle. The application of that one principle alone would have the effect of narrowing to a very substantial degree the field within which reparations claims could be considered. I need only remind this Commission that out of the hundreds and hundreds of rate cases that have been considered by the Board of Transport Commissioners since its inception, only a mere handful have been decided upon grounds of the justness and reasonableness of the rates per se. Further confirmation of this fact may be found in the brief of the Canadian Manufacturers' Association, which was compelled to adopt as its leading example of hardship caused by the reparations principle, the B. C. Tree Fruits case as to icing charges, which arose out of a most unusual situation caused not by the Railway Act at all, but by Order No. 92

of the Wartime Prices and Trade Board.

The Canadian Manufacturers' Association in Appendix C of its brief, proposes an amendment to the Railway Act to incorporate within the Act a series of sections that have been lifted almost verbatim from the Interstate Commerce Act. These are some of the sections of the Interstate Commerce Act relating to reparations, but I should point out that they are not all of the sections, nor do they appear to have been extracted in any logical order or to have been adapted in any way for the purpose of being fitted into the Canadian Act.

There are six subsections in the proposed amendment and their corresponding numbers in the Interstate Commerce Act are as follows: Sections 13(1), 16(1), 9, 16(3)(a), 16(3)(g), 16(3)(e). In only one of these clauses has there been any attempt at rewording.

In proposing these additions to the Railway Act, the Manufacturers' Association makes no suggestion for the repeal of Section 330, and it is my submission that unless Section 330 were repealed when the sections providing for reparations were inserted in the Railway Act, those sections would be totally useless for the purpose for which they were intended by the Manufacturers' Association. As long as our system of rate making includes the principle of Standard Mileage Rates, the principle of reparations will be ineffective.

The question then boils down to whether it is desirable to do away with Standard Mileage Rates in the Canadian Act. My submission is that there would be no justification for taking this step merely for the purpose of allowing the reparations principle to be invoked. In fact, that would be a step backward instead of forward. The Canadian Act by Section 330, provides the means for

accomplishing for all rates the same result that is only accomplished in the United States by the efforts of the Interstate Commerce Commission in examining individual rates and by trouble and expense to the shippers in applications and complaints to the Commission. At the same time, under the Canadian Act it is possible to avoid the disabilities, and they are many and serious, that come with the reparations principle. I mentioned some of these disabilities previously, and I should like to refer to them again in a little more detail.

In the first place, if the reparations principle were adopted, the railways would have no assurance at any time that charges received from shippers in the past might not be brought into question and ordered partially refunded. For example, in reporting revenue received for the month of April 1950, the railways could not be sure that due to some finding by the Board in 1951 or 1952, that revenue might not be altered. It is quite possible that the railways might have to set up reserves to meet such contingencies.

Secondly, while it is true that the establishment of a reserve and the cost of reparation payments would, if spread over all freight rates, have only a slight effect upon those rates, nevertheless, it can hardly be said that there would be a compensating justification in the benefit received by the shippers who obtained rebates upon past shipments.

The experience in the United States has been that a substantial part, if not the major part of the reparation payments, is retained by the claims agencies that grow up for the purpose of fomenting claims against the railways on a percentage basis. That type of business is not one that should be encouraged or tolerated in this country. It adds

nothing to the national wealth and maintains a parasitical existence only by stirring up needless trouble and expense.

Another reason why under the reparations system there is little of any advantage to the man who pays the freight, is that the claim is usually made and the reparation paid long after the shipment in question has moved. In the normal case, the freight charges are added to the price of the commodity, but by the time that the shipper receives reparation the consumer has already paid the freight on the higher basis, and he receives no rebate. Consequently, the reparation becomes a mere gratuitous payment to the shipper, who has already been reimbursed in full by the consumer.

Another undesirable feature of the reparation system is the one mentioned particularly by Mr. Jefferson in his evidence at p. 15461 and the following pages of Vol. 76. Mr. Jefferson pointed out that reparations are nothing more than legalized rebates which can be grossly abused. As he stated, we did away with the rebate system when the present Railway Act was passed in 1903. Rebates, whether they are in the form of reparations or otherwise, tend to be given to the larger shippers rather than the smaller ones, and thus an unjust discrimination is created. The methods whereby this might occur, and has been known to occur in the United States, are described in Mr. Jefferson's evidence at pp. 15464 and 15465.

Totalling up these disadvantages of the reparation system, I earnestly submit to this Commission that the system is not one that it is desirable to introduce into this country. Those disadvantages greatly outweigh any of the rather vague and inconsequential advantages that its proponents have been able to suggest in favour of the system.

The Canadian Manufacturers' Association in its brief, cited examples of the so-called hardships to the shipping public by reason of the lack of power in the Board to grant reparations. In answer to these examples, I should like to refer to pp. 112 and 113 of Part II of our brief in which these cases are dealt with, and it is shown that even if the Board did have the necessary authority, there is no probability that reparations would have been found justified. In fact, in most of the cases cited the applicant failed on the merits to establish unreasonableness.

There is one point that we have emphasized before, and that I should like to emphasize again, and that is that under the present Act, if the railway company is in breach of any of its obligations under the Railway Act or under any Order of the Board, it is liable in damages by virtue of Section 385 of the Railway Act. In such a case the action is brought in the courts, and it is our submission that that is the place where it belongs. It should also be emphasized that under the Act as it now stands, full recourse is provided where the incorrect rate is charged. For example, if an agent misreads the tariff or makes a charge on the basis of the wrong tariff, the railway is bound to refund any over-charge and is bound to collect any under-charge. These overcharges and undercharges are collectible through the courts.

One further matter that should be mentioned is that while most of the discussion before this Commission has related to reparations in respect of rates and tolls, it is to be noted that under the proposed amendment the power to award reparations extends to all matters arising from alleged breaches of the Act. This would give to the Board of Transport Commissioners jurisdiction with regard to all claims for damages in respect of breaches of duty by a

railway company under the Act. There is absolutely no need for such a transfer of jurisdiction from the courts to the Board, nor has any evidence been offered to this Commission that even suggests that such a transfer is desirable. In our submission, it would impose upon the Board without cause or justification a vast new sphere of activity and responsibility, causing such a congestion of work as practically to bring to a standstill the carrying out of the Board's true functions and duties.

Finally, and to summarize what I have said, I submit that the principle of reparation, while it may be acceptable in the United States, is not one for which there is any need in Canada. The Railway Act, as it now exists, accomplishes results that are at least as fair and just to all parties with less trouble and expense to them, by the mere expedient of assuring that all rates are within just and reasonable bounds before they go into effect. At the same time, the Canadian system avoids the undesirable features that necessarily accompany the reparation system. The Railway Act also leaves the Board free and unencumbered to perform its proper and necessary function and avoids making the Board merely another court for the hearing of claims for damages.

The reparations principle was already well known in the United States when the Railway Act was first passed in its present form in 1903. Dr. McLean, whose extensive researches laid the foundations of the Act, was well aware of the reparations sections of the Interstate Commerce Act, and mentioned them in his report to the Minister of Railways and Canals. Parliament was, therefore, fully informed on the subject and must be taken to have intentionally planned the Act in such a way as to avoid the inclusion of the principle. I submit that that decision

by Parliament was very wisely made, and since Parliament so laid out the Act that there was no necessity for the inclusion of reparations sections, the plan of the Act should not now be upset and made meaningless in this respect by the change proposed to your Commission.

For these reasons, it is submitted with great respect that this Commission should make no recommendation for the amendment of the Act by the inclusion of sections providing for reparations.

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CANADIAN NATIONAL-CANADIAN PACIFIC CO-OPERATION

Clause 2(e) of the Order in Council setting up this Commission reads:

"Review and report on the results achieved under the Canadian National-Canadian Pacific Act, 1933, and amendments thereto, making such recommendations as the present situation warrants."

Presumably, the Order in Council is directed primarily to Parts II and III of the Canadian National-Canadian Pacific Act, which deal with co-operation between the two railways, and it is to those parts that I propose to refer in my argument.

The Order in Council requires this Commission to perform two tasks: First, to review and report on the results achieved; and secondly, to make such recommendations as the present situation warrants. My argument will suggest that this Commission might well report that the results achieved by the existence of the Act have been not only those tangible results that are shown in the dollars and cents of savings made by the railways, but also the even more valuable purpose served by the Act as a guiding principle to the railways in their relationships with

one another. My argument will also suggest that the Commission recommend the retention of the Act in its present form without amendment, for the reason that as it stands it is today serving a useful purpose and may be expected to continue to fulfil this purpose in the future.

The results achieved in a monetary way by co-operative measures are set out in the briefs of both companies and filed with the Commission, and as they have been described in some detail both by Mr. Armstrong and Mr. Fairweather, I do not propose to spend time in re-viewing them. I need only say that these projects are of various kinds and that the lists contained in the briefs include all projects of a joint co-operative nature that the two railways have been able to discover since the Act came into being. While only a comparatively small number of them have been found to promise sufficient economies to warrant their being put into effect, the length of the list gives some small indication of the effort that has been expended by the railways in attempting to carry out the word and spirit of the Act.

In the course of presentation of the evidence on this matter to the Commission the attitude of the Provincial representatives seemed to be that the results achieved by the railways had been unreasonably small and the process of putting measures into effect had been unreasonably slow, and I should like to take a moment to discuss that question.

I do not think anyone here, except those who have actually taken part in the studies and negotiations leading up to one of these agreements, can have any conception of the amount of work that is involved in putting even one of the proposals into effect. Mr. Armstrong and Mr. Fairweather appeared here and gave evidence with

very little in the way of papers and documents in the court room to support what they had to say, but I know that Mr. Armstrong came to Ottawa with a selection of only the most essential records relating to the co-operative measures and they filled two large trunks that were kept in storage at the station. Those were only a small part of the records of the Canadian Pacific section of the Joint Co-operative Committee alone, and almost equally voluminous files exist in the Accounting Department, which has the difficult and involved task of working out the calculations upon which an agreement is founded, and the Law Department, which must negotiate the wording of the agreements.

The delays that occur might seem to indicate some unreasonable attitude taken by one or other of the railways that prevents the parties from closing up the matter more quickly, but I believe that this is not a proper inference.

Mr. Frawley in speaking of the Alix-Nevis abandonment, suggested that there should be very little difficulty about putting into effect an abandonment of some nine and a half miles of line across the Alberta Prairies, and at first glance that would appear to be so. However, let us consider the arrangement made in that case. One company was to abandon nine and a half miles and was to route its trains over the other company's line for that distance so that the trains of both companies were to be operating on the same track. When we have a joint track with maintenance to be done on it, we must have joint employees performing that maintenance. Also, at the terminals at either end we usually have tracks that are used jointly and tracks that are used exclusively, and in those terminals we may have employees occupying part of their time as joint employees and the balance of their time as

exclusive employees. Similarly, we may have joint switching engines and exclusive switching engines.

Let us consider, then, the difficulties involved in drafting only that small part of the agreement relating to liability in the event of accident. We must consider, for example, the possibility of collisions between exclusive trains of the two companies on joint tracks; collisions between an exclusive train of one party and a joint switching engine; collisions between two trains of the same party caused by a joint employee or by the exclusive employee of the other party; and all types of accidents caused by joint employees and exclusive employees. The complications of those liability sections alone are enough to give the law departments of the two railways a very heavy amount of work, even with the best will in the world on both sides to achieve an amicable agreement, and those are only the legal complications that arise after the accounting departments have worked out their equally difficult problems.

While it is possible in the case of such projects as pooling arrangements to put the proposals into actual operation before the agreement is signed, that is only possible because such measures can be terminated if it is eventually found impossible to reach agreement. On the other hand, line abandonments cannot be treated in this way. Once an abandonment is made there is no turning back, and consequently it cannot be put into effect until the formal agreement has been executed.

We do, however, find one method of saving a great deal of time and effort in these line abandonment cases. The procedure in relation to the earlier proposals was to complete the studies, draft and execute the agreements and then apply to the Board for leave to

abandon and the work that we had done was wasted. In the later cases, therefore, we agreed that as soon as a definite decision had been made by the two companies to proceed with an abandonment, we would apply to the Board for leave, and not until such leave was obtained would we do the work of preparation of the formal agreement. It happened that Alix-Nevis was one of these latter cases, and it also happened that that case being dealt with a little later than the others, was not completed when the war overwhelmed us all with more urgent and vital work.

While I am on the subject of these line abandonments, I should like to emphasize, just as I did when the evidence was being put in, that in a number of these cases the strongest opposition that we encountered came from the very parties, and in some cases the very same counsel, who are appearing before this Commission today arguing that the railways have failed to achieve economies. As I mentioned before, every joint co-operative abandonment that we proposed in the Province of Manitoba was opposed by two counsel, Mr. E. K. Williams, K.C., as he then was, and either Mr. J. M. George, K.C. or Mr. D. C. McGavin. It will also be seen from the reports of these cases in C.R.T.C. that in the Province of Alberta, Mr. Frawley appeared with Mr. D. N. Gardiner for the Province of Alberta in the Langdon-Beiseker case, and that Mr. B. Wilson, K.C. appeared for Alberta in the Treacle-Morinville and Carbondale-Egremont cases. In fact, the judgment in these last two cases sets out at some length the grounds upon which Counsel for Alberta "urged" that the application be refused. While the Alix-Nevis case is not shown in the reports, it is my understanding that Mr.

Frawley appeared there also, either directly on behalf of the Province or on behalf of the municipalities at the request of the Province. In the Forth-Ullin case in Alberta, the judgment does not show the Province to have been represented by counsel, but it does show that a Provincial Government engineer was present to give evidence as to the expense to which the Province would be put to improve the neighboring roads if the line was abandoned.

Having taken that position in spite of the economies that the railways were agreed upon and hoped to accomplish, I suggest that these Provinces cannot properly be heard now in criticism of the railways for failing to accomplish them. The attitude of each of the provincial representatives appear to be that the railways should effect economies in every other province except his own. In the course of presentation of the evidence, your lordship invited all of the Provinces to come forward with suggestions as to what projects might have been considered that the railways had failed to accomplish, and not one suggestion was forthcoming, except from Mr. Brazier, who suggested a joint terminal in Vancouver upon the assumption, which to his surprise turned out to be completely unfounded, that the Canadian Pacific had refused to co-operate in that respect. The fact turned out to be that the Canadian National had never even requested the Canadian Pacific to consider in such a proposal because capital expenditures that would be necessary on the part of both parties made the project impracticable.

I draw to the attention of the Commission how careful all other Counsel were to avoid cross-examination on projects within their own respective provinces. For example, Mr. MacPherson took as his prime example a

proposal for co-operative measures in the Fort William-Port Arthur terminal, but he said nothing at all about eleven projects in the list that were within his own province.

I have been speaking of the results that we have achieved in a monetary way under the Act, and I do not want to leave that subject without stating quite frankly that those results are not yet as great as even we in the railways believed would have been accomplished by this time. I think it is fair to say, however, that if the war had not intervened to bring our endeavors practically to a standstill, we would by now have been considerably farther ahead. I think it is also fair to say that the opportunities for further co-operative measures may not be substantial at the present time but will become greater if our traffic continues on the downward trend.

The Canadian National-Canadian Pacific Act was a natural and very desirable result of the times in which it was passed. All through the 1920's, and into the first years of the depression, the Canadian National Railways were organizing themselves into a co-ordinated and efficient organization, and were hungry for traffic with which to feed their system. The Canadian Pacific, seeing this new and formidable competitor arising, was fighting hard to retain its own traffic and consolidate its position. The result was an era of severe, ruthless and wasteful competition which threatened the stability of the Canadian Pacific and brought injury to the economy of Canada.

When the depression came upon us the railways were among the first to suffer. Their traffic fell off to an alarming degree and many of their facilities lay

idle or were used to only a fraction of their capacity. Obviously, some curb had to be placed upon the wasteful rivalry between the two companies, and it also seemed obvious at that time that with the duplicate plants of both companies lying practically idle throughout the country, great savings could be obtained from combining them wherever possible into one.

Out of that situation arose the findings of the Duff Commission which brought about the Canadian National-Canadian Pacific Act of 1933. Out of that situation also arose the policy urged during those years by Sir Edward Beatty of unification of the two systems under a single management. Sir Edward Beatty's proposal culminated in the Senate investigation of 1938 and 1939.

However, even as late as 1938 and 1939 it was impossible to foresee, and no one did foresee, that within a matter of two or three years the facilities of both companies would be strained to capacity by war conditions, and that the possibilities of savings from co-operative measures would largely disappear. It is undoubtedly very fortunate that some of the measures proposed during the 1930's had not been fully implemented by the time that war broke out, as some of the facilities we had proposed to reduce or abandon would have been sorely missed under the impact of war traffic.

Now, I do not mean to suggest that the Canadian National-Canadian Pacific Act is outmoded. On the contrary, I submit that the Act should remain for two purposes; first, to be used for further co-operative measures as and when opportunities arise; and secondly, as an admonition to the railways to avoid damaging and wasteful competition and to attempt to work out their difficulties in a spirit of co-operation.

The Provinces appearing here have suggested two types of amendments, although even among themselves they have been unable to co-operate to such an extent as to agree upon the changes they propose. Mr. Smith and Mr. Frawley have adopted the proposal of the Canadian Federation of Agriculture that a new permanent tribunal be set up to conduct research into possible co-operative measures, to recommend to the railways such measures as it favours, and to make an annual report of its findings to Parliament. On the other hand, Mr. Shepard and Mr. MacPherson do not want such a tribunal, but their proposal is that the Canadian National-Canadian Pacific Act and The Railway Act be amended to give the Board jurisdiction to investigate co-operative measures, and by some means or other to compel their adoption by the railways.

Now, before examining those proposals further, I should like to ask what is the necessity for changing the present Act, and what feature of the Act as it stands is undesirable.

Any legislation on this subject must deal with two factors which are more or less in conflict; first, competition between the railways and, secondly, co-operation between the railways. Public policy requires the maintenance of competition, but it also requires competition to be kept within reasonable bounds. On the other hand, public policy also requires co-operation, but there again it desires co-operation to be kept within reasonable limits, as may be seen from Section 27 of the Canadian National-Canadian Pacific Act, which reads as follows:

"Nothing in this Act shall be deemed to authorize the amalgamation of any railway company which is comprised in National railways

with any railway company which is comprised in Pacific railways nor to authorize the unified management and control of the railway system which forms part of National railways with the railway system which forms part of Pacific railways."

In other words, the desire is for a "middle of the road" policy. If we eliminate co-operation altogether we have a state of all-out destructive competition, and if competition is done away with, we have complete unification or amalgamation.

What this Act tries to do is to keep these opposing factors in balance, so that co-operative measures can be adopted that do not impinge too heavily against the competitive positions of the two railways.

The minute you apply force to compel co-operation you are upsetting that balance, and particularly if the force is applied from outside. When you compel co-operation you are in effect abolishing competition, and the purpose of the Act is lost.

It is true, of course, that in the arbitration sections there is already a provision in the Act for the exercise of force, and it is very important to observe that by a wise limitation of the statute the arbitral tribunal can only be invoked from within. If one company invokes the tribunal, so can the other and the balance is more or less restored, but if that or any other form of force were to be made applicable from the outside, both companies would be helpless to guard against the destruction of their efficiency as competing systems.

For that reason, I say that the Act as it stands is well planned and useful, and that any amendments of the kinds now proposed would upset the whole intent of the Act

and serve nothing but a harmful and destructive purpose.

The proposal made by the Canadian Federation of Agriculture and adopted by Mr. Frawley and Mr. Smith, seems on the face of it, fairly innocuous. The new tribunal is ostensibly to have nothing but the power to investigate, to make recommendations to the railways and to make reports to Parliament. There is nothing in those words about any exercise of force. In fact, the functions of the new tribunal would appear to be very similar to the functions now performed by the railways in this matter of co-operative measures. The railways themselves make investigations, arrive at decisions or recommendations, and the Canadian National makes reports to Parliament. The only difference is that the investigations and studies made by the railways are made by the most skilled and experienced men in Canada upon the subject of railway operations, and those men from the bottom to the top, must take full and personal responsibility for their decisions and recommendations, and the results that emanate from those decisions and recommendations. On the other hand, the tribunal no matter how high the calibre of its personnel, could not possibly have the direct knowledge and experience of those actually operating the railways and would have no responsibility for the result of their recommendations.

Now, as I said a moment ago, the mere existence of a tribunal which only makes recommendations and reports, would seem to be reasonably innocuous, but let us see what Mr. Frawley has in mind. At page 21017 of Volume 116 of the Transcript, Mr. Frawley was asked by the Chairman:

"Then I want to go the full length and see how far it does go. Is it, then, the intention that the orders of this body are enforceable

against the railways?"

Mr. Frawley:

"Well, that is a crucial question, and I do not think Dr. Hope went that far. I think he simply said that they should have the right to propose to the railways. And surely, if the tribunal was there, commissioned by Parliament to do these very things, surely it would almost automatically have much more than a merely moral effect upon the railways to undertake these things and carry them out."

There is the point at which Mr. Frawley expects that the outside force will come creeping into the matter. He foresees that the activities of this tribunal will have, as he says, "much more than a merely moral effect". In other words, the tribunal will be exerting compulsion, and he goes on to explain:

"I mean, my lord, if this tribunal reported year after year for two or three years that they have proposed certain measures to the railways and they had not been carried out, then probably further restrictions and powers would be given to this tribunal. I think it is the Federation's thought that it might commence in this way and perhaps become stronger afterwards."

That is the very situation that I submit we should do everything to avoid; the situation in which the unskilled and outside body is given power to exert force upon the railways to put measures into effect notwithstanding the recommendations to the contrary made by the expert committees of the railways themselves. Speaking personally and frankly, I have no doubt at all as to what would happen, and that would be that this tribunal would make unseasoned

and inexpert recommendations, some of which the railways would be forced to adopt in spite of the damage they might do. The recommendations of the tribunal would look very reasonable and convincing to a layman, but the results would be the same and equally as dangerous, as if the President of the Canadian Pacific appointed a member of the Law Department to recommendations as to how our engineers were to improve their efficiency in building a bridge.

Mr. Smith, Mr. MacPherson and Mr. Frawley all spoke of the lack of what was called "policing" under the present Act, and if I may digress for a moment, I should like to register a protest against the use of that word that crops up so constantly in the language of Provincial Counsel. I object to the attitude which seems to regard two of the greatest, soundest and most dependable and responsible corporate citizens of this country as potential criminals that have to be watched and "policed" for fear that they will put something over on Canada. To a very large extent the Canadian National and the Canadian Pacific are Canada, and their own interests are identical with the welfare and progress of this country. If there are opportunities for economies, those opportunities will be seized by the railways without any necessity for "policing". If economies can be made that will maintain low freight rates or reduce them, both of the railways have plenty of incentive to put those economies into effect, because it is to the interest of the railways much more than to any individual shipper or group of shippers to further the development of Canada by keeping rates as low as is economically possible.

Mr. Shepard and Mr. MacPherson both express

themselves as being opposed to the new tribunal advocated by Mr. Smith and Mr. Frawley. Their attitude is that the Board of Transport Commissioners should be given power to investigate co-operative measures and to force the railways to adopt them. According to Mr. Shepard, the force was to be imposed in this way: That the Board would come to a decision upon what measures it thought should be put into effect, and then it should adjust the rate level to deprive the railways of amounts equivalent to the economies that the Board thought they might make by the adoption of these measures.

That, again, is the imposition of force upon the railways from without, which, as I pointed out before, is really the cancellation or elimination of the competitive factor. If, then, the Board is to have this power to deprive one or other of the Railways of its competitive position, it must follow that the Board will have to determine the value of the competitive element so that the railway losing its competitive position can be compensated for its loss. That, I suggest, is something that is peculiarly within the knowledge of the railways themselves and even the Board of Transport Commissioners, with the resources and information upon which it could draw, would be unable to make a proper determination of this value.

Secondly, if the Board is going to be given the power to eliminate competition, where is that power to end? If it does not have a limit, the effect of the proposal made by Mr. Shepard and Mr. MacPherson would be to place in the hands of the Board of Transport Commissioners the power to effect complete unification or amalgamation of the two systems which as I pointed out before, is contrary to established public policy as

expressed in such sections as Section 27 of the Canadian National-Canadian Pacific Act.

There is another very grave objection to the proposal that the Board shall have jurisdiction to investigate possible economies under the Canadian National-Canadian Pacific Act. If it were a prerequisite of an application for a rate increase that the railways prove all possible economies to have been made, I can think of no surer method of blocking further rate increases for all time, and I think I am safe in suggesting that this is in reality the object that lies behind the proposal of the Provinces.

I need only refer this Commission to the list of projects set out at pp. 132 to 138 of our brief to illustrate what I mean. Let us suppose that when on July 27, 1938, we were filing our application with the Board for a rate increase in consequence of the sudden imposition upon us of some twenty-seven million dollars a year in extra labour costs, we had been obliged to file with the Board as part of our supporting material this list of joint co-operative projects, and to prove that every one of them had been fully investigated and that all economies that could possibly be obtained from any of them had in fact been obtained. It is not hard to imagine how the Provinces would have seized upon such a golden opportunity for the exercise of delaying tactics. We would have been called upon to produce records of all the meetings in connection with every project. The long and complicated accounting calculations would have been gone over item by item, and a series of alternative calculations would have been submitted as exhibits by the Provinces. We would have been sitting there yet and would not have been half way through the list, and even when the list had been

covered, we would have had to produce evidence covering the whole of the systems of both railways to show that there were no other possibilities of projects that had not been contained in the list. There is nothing extreme about that picture, nor do I think that there is anything unfair about my statement that those are the tactics which would have been employed by the Provinces. They themselves have boasted that every day for which they can delay the coming into effect of a rate increase means a victory for the Provinces, regardless of the merits of the case.

Before I leave this subject I should deal with a question asked by your lordship at page 21009 as to the meaning of the word "dispute" in Sections 17 and 18 of the Act. In Section 3(b) "dispute" is defined as any failure of the companies to agree concerning any matter upon which they are authorized to agree.

In the first place, it is clear that a dispute within the meaning of the Act can only take place at the level of the Joint Executive Committee, since it is only at the executive or policy level that the companies as corporate entities are involved.

When a proposal reaches the Joint Executive Committee, there are only, speaking broadly, two things that the Committee can do; it can either agree or it can disagree. If there is disagreement between the two Sections of the Committee, that situation becomes a dispute within the meaning of the Act and the tribunal may be invoked.

On the other hand, there are several ways in which the Joint Executive Committee may agree. It may agree:

1. To accept the proposal and put it into effect;

2. To reject the proposal because of difficulties or objections of one or other of the parties;
3. To return the proposal to the lower committees for further study of ways and means to overcome the difficulties encountered.

Whichever of these three alternatives is adopted by the Committee, I do not think that there is any failure to agree within the meaning of the definition clause of the Act. I suggest that there is considerable significance to be attached to the fact that the definition clause is worded:

"Any failure . . . to agree concerning any matter upon which . . . they are authorized to agree."

The clause does not speak of failure to agree to adopt a measure, plan or arrangement, and so long as the companies are in agreement upon the adoption, rejection, restudy or any other action as to a proposal, they cannot be said to be in dispute. As I said at the time that the evidence was being put in, the two companies have never come to the point, in dealing with these co-operative measures, at which one party said, "We insist" and the other party said, "We refuse." It is only at that point that the arbitral tribunal might be invoked.

That brings me to the end of what I have to say about the Canadian National-Canadian Pacific Act. I have not endeavoured to cover all of the points raised at the time that the evidence was submitted to your Commission, such, for example, as the absurd situations that would occur if the proposed new tribunal should attempt to enforce a co-operative measure and the Board should hold against it, or if under the other proposed

system the Board should reduce railway rates on account of a possible co-operative measure that might later be denied by the Board itself on the strength of local opposition. Many of those points were perhaps adequately dealt with in the course of the evidence, and the evidence was heard only a comparatively short time ago.

What I have said now may be summed up in the submission that the Canadian National-Canadian Pacific Act has fulfilled and will continue to serve a most useful purpose, and that purpose should not be destroyed by the injection into the Act of any provisions that would upset the balance between co-operation and competition by the imposition of force in any form.

I now deal with the Canadian Pacific's proposed amendments as to grade crossing protection.

RE GRADE CROSSING PROTECTION - CANADIAN
PACIFIC PROPOSED AMENDMENTS

The Sections of The Railway Act dealing with highway crossings extend from Sections 255 to 267 inclusive, and the Canadian Pacific is proposing the amendment of Sections 259, 260 and 262 which relate particularly to the apportionment of cost of protection of crossings, and the establishment and administration of the fund set up by Parliament for the purpose of assisting in grade crossing protection and known as the Railway Grade Crossing Fund.

THE CHAIRMAN: What are you asking for in your amendments?

MR. SPENCE: Asking for an increase of the percentage that may be contributed from the Grade Crossing Fund to any project of grade crossing elimination and for the removal of the maximum amount of \$100,000 -- there is a limitation of \$100,000 on the amount that the Board may contribute out of the Grade Crossing Fund to any particular project.

THE CHAIRMAN: Is that in Section 262?

MR. SPENCE: 262, yes, my lord.

In the mimeographed copies of our proposed amendments to this section filed with the Commission, two mistakes occurred in Subsection 5 of Section 262.

The first was at the beginning of the Subsection where the word "thereof" was mistaken for the word "thereafter". The opening words should read, "The grants or the unexpended portions or moneys thereof".

The second error was that at the very end of the same Subsection, the words "subject to the terms and

conditions in this section contained" should have been included.

In reading over the proposal made by the Canadian National for amendment of this Subsection, my attention was also drawn to the fact that in the Canadian Pacific draft we had not included a reference to Chapter 27 of the Statutes of 1948, and upon further study of the matter I find that there are two other statutes to which reference should also have been made.

All of the necessary corrections have been made in the proposed amendment as it is copied into pages 12 and 13 of the consolidation of amendments to the Railway Act which I have handed to the Commission.

THE CHAIRMAN: Pardon me a moment, I take it we have your Canadian Pacific amendments -- oh, in your own consolidation?

MR. SPENCE: In the consolidation they are correctly stated. They were not correctly stated before.

THE CHAIRMAN: On what page in the consolidation?

MR. SPENCE: Pages 12 and 13 of the consolidation of the Railway Act.

The necessity for adding these references into
at
the amendment / this juncture merely goes to confirm
what I have attempted to emphasize previously, that attempts to make revisions in a statute require the most extreme caution if unexpected and possible disastrous results are to be avoided.

Speaking generally of the changes we are suggesting in these three sections, the principle upon which they are based is that there has been in recent years a reversal of the situation that existed when Parliament first passed these sections in the year 1909. The debates in the House of Commons in Hansard of

1909 show that the rapidly increasing traffic upon the railways and the increasing speed of trains were causing a need for additional grade crossing protection. It is quite evident from Hansard that Parliament considered the added danger to be attributable almost entirely to the railways and there seems to be little doubt that this was true, as those were still the days of the mud road and the horse and buggy.

Since then, however, we have seen a most complete revolution in the mode of highway travel, while at the same time there has been very little change of a basic nature on the railways. While the railways are, of course, carrying very much more traffic than they did in 1909, the traffic is being accommodated ^{by} means of larger cars and longer trains powered by heavier locomotives, so that the number of trains operated has not increased to any appreciable extent. For this reason it can be said that the railways have not caused an increase in the hazards at crossings to anything like the same extent as those hazards have now been increased by highway traffic.

We now see the country covered with a network of paved and improved highways carrying automobile traffic at speeds that were not dreamed of in the year 1909. I need only remind the Commission that an automobile travelling at sixty miles per hour may be fully half a mile from a crossing when a freight locomotive sounds its whistle at the whistle post, and may yet arrive in time to be struck by the locomotive.

This revolution in highway traffic cannot be attributed in any way to the railways, and in fact it has made very serious inroads into railway business, both

passenger and freight. It has at the same time created a need for a great number of grade separations by ^{means} ^{number} of subways and overhead bridges, and a much greater/still of installations of automatic warning devices.

THE CHAIRMAN: Have you thought whether there should be any change in the statutory obligation about ringing of bells and sounding whistles and so on, in view of what you say there, that an automobile travelling at sixty miles an hour may be fully half a mile from a crossing when the whistle is blown?

MR. SPENCE: Yes, my lord, exactly.

THE CHAIRMAN: You think there might be some useful change made in the Act about blowing the whistle, to make it more continuous than it is now, right up to the highway crossing itself?

MR. SPENCE: The difficulty we encounter there, my lord, is that if we blow the whistle too much, we have complaints from the whole surrounding neighborhood.

THE CHAIRMAN: Yes, I know that.

MR. SPENCE: That there is too much noise from the railways.

THE CHAIRMAN: Have the railways looked into that?

MR. SPENCE: Oh, yes, they have a study under way a great deal of the time as to methods of improving the whistle devices, the warning devices; and as a matter of fact in connection with diesel locomotives there has been quite an extensive investigation of what the best practical devices are, and experiments have been made with different kinds of horns to ascertain what is the most penetrating sound and how it can best be directed to the point - -

THE CHAIRMAN: In the whistle itself, you mean?

MR. SPENCE: Yes, my lord.

THE CHAIRMAN: What I had in mind particularly

was the time at which the whistle must be blown, the distance from the highway, and so on, the ringing of the bell; whether any changes might usefully be introduced there.

MR. SPENCE: Well, my lord, I think that the Board has that very well in mind, and its own experts are making investigations of that kind and keeping the matter well under study. If their experts conclude that some changes should be made, I am sure they would be quite quick to suggest them.

These measures have cost a great deal of money (that is, automatic warning devices and subways and overhead bridges), and as highway traffic continues to grow more measures of the same kind will be necessary. In fact, the Board of Transport Commissioners has applications constantly under consideration for construction of subways and installation of automatic protection at grade crossings. A short time ago the Province of New Brunswick filed eleven applications in one day for installation of flashing light signals on Canadian Pacific lines alone within that Province, and I presume that at the same time it was making at least as great a number of applications in respect of Canadian National crossings. Now, the position that we take is this -- that while in the early days it may have been perfectly proper and reasonable to assess against the railways a considerable portion of the cost of the protection that was needed, there is no justification for compelling the railways to pay any substantial part of the very much greater protection now needed and that will be needed in the future. The added necessity of protection having been caused by municipalities, counties and provinces which have constructed this network of high speed highways, and having been caused by the public of Canada who use these highways

with their cars and trucks, it is our submission that they are the parties who should bear the cost. We propose, therefore, that the Act should be amended to this end.

Section 259, which we propose to amend, provides that the Board may order what portion, if any, of the cost of grade crossing protection "is to be borne respectively by the company, municipal or other corporation, or person". It also provides that the Board's order "shall be binding on and enforceable ^{any} against ~~any~~ railway company, municipal or other corporation, or person named in such order."

I draw to the attention of the Commission the fact that the Crown is not named in that Section, and as we have explained in our Brief at p. 140 of Part II, the Board has taken the position that due to this omission it cannot order a Provincial Department of Highways to contribute toward to cost of crossing improvement even in respect of a Provincial highway.

THE CHAIRMAN: Could they be given such power in any event ?

MR. SPENCE: Yes, my lord, there are several cases in which it has been held that when the Crown is named in a Dominion Statute, it will cover the Crown in the right of the Province. I cite for example the case of Attorney General of Quebec v. Nipissing Central, 1926, Appeal Cases, p. 715. That case holds that Section 189 of the Railway Act which empowers any railway with the consent of the Governor General to take Crown lands for the use of the railway, applies to Provincial Crown lands as well as Dominion Crown lands, and the enactment is intra vires of the Dominion.

Then there are several cases in which it has been held that the Railway Act governs municipalities even though the municipalities were constituted under Provincial

legislation. Then there is a series of cases holding that the Crown, as named in Section 188 of the Dominion Bankruptcy Act, applies to the Crown in the right of the Province as well as in the right of the Dominion. So that I think it is quite proper to say that if the Crown is named in Section 259, the Section will apply to the Crown in the right of the Province as well as in the right of the Dominion. It is quite true that in some circumstances the Provincial Department has volunteered to contribute part of the cost, but in our view this is not an altogether satisfactory situation. The Board should have the right, when dealing with the Provincial highway as well as any other highway, to order the body controlling the highway to pay its fair share of the cost of protection. The Board should have freedom to decide on grounds of public safety alone whether protection or grade separation is or is not to be undertaken. In practice, however, it has been hampered in many cases by the fact that Provinces have refused to contribute.

We, therefore, propose that Section 259 be amended to read as follows:-

"259. Notwithstanding anything in this Act, or in any other Act, the Board may order what portion, if any, of cost is to be borne respectively by the Crown, the company, municipal, or any other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforceable against the Crown, any railway company, municipal or other corporation, or person named in such order."

COMMISSIONER INNIS: Is there such a thing as a good Province or a bad Province? Which Provinces have

proved most co-operative? Or wouldn't you care to say?

MR. SPENCE: I wouldn't care to say in public. As a matter of fact, Provinces at times are very co-operative, and at other times are not co-operative, and I don't know that one can draw comparisons between them.

A comparison of this proposed Section with the present Section 259 will show that the only changes are the addition of the words "the Crown" in two places, and the deletion of a reference to Section 260, which we are proposing should be repealed.

Section 260 is one of the Sections to which I referred a moment ago, which while perhaps applicable to conditions of 1909 has no lost its applicability by reason of changed conditions. The Section reads as follows:-

"In any case where a railway in constructed after the nineteenth of May, one thousand nine hundred and nine, the company shall, at its own cost and expense, (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipal or other corporation or person), provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway".

(Page 23470 follows)

The effect of this Section is to provide that if for example, automatic protection appears desirable at a crossing, the first thing enquired into is whether the railway was constructed at that point before the nineteenth of May, 1909, or after that date. If it was constructed before that date the Board may apportion the cost between the parties under Section 259, but if it was constructed after that date the railway must bear the whole cost unless the railway can go to the municipality or other highway authority, and persuade that authority to enter into an agreement to contribute part of the cost. It can readily be imagined that the railway has very great difficulty in convincing the municipality that it should sign such an agreement when the municipality sees that by Section 260 it can avoid all responsibility for paying its share merely by refusing to enter into the agreement.

I submit that there is no longer any logical or justifiable reason for treating crossings that came into existence prior to 1909 in one way and after 1909 in another way. The present situation is unduly and improperly onerous upon the railways. All crossings should be treated alike regardless of when they were constructed, and the Board should have full discretion to allocate the costs upon the basis that it finds fair and reasonable. I, therefore, submit that Section 260 should be repealed.

We do not propose any amendment of Section 261 which relates to foot bridges, but we do suggest certain amendments of Section 262. This is the Section dealing with the Railway Grade Crossing Fund. It is a very long Section, and I do not propose to read it in full. Our amendments relate only to Subsections 1, 2 and 5.

The proposal for amending Subsection 1 is for no other purpose than to delete the part of the Subsection that will cease to be required if Section 260 is repealed. I refer to the latter part of the Subsection which deals with the complicated situation that arises when contribution is made from the Grade Crossing Fund toward the cost of a crossing constructed after 1909. It will be observed that the Subsection as it stands does not permit the railways to receive even a contribution from the Grade Crossing Fund toward protection of the crossing constructed after 1909 unless they are able to make an agreement with the highway authority for a contribution from that authority. This, I submit is a very serious injustice to the railways and a further reason why Section 260 should be repealed.

Our proposal for the amendment of Subsection 2 eliminates the limitation of \$100,000. imposed at present upon a contribution from the Grade Crossing Fund to a project ordered by the Board. Our proposal also increases the percentage of the cost that may be contributed through the fund from 40% to 70%.

At the present time, Subsection 2 permits the Board to contribute no more than 40% of the cost of any one project, but when the project is an expensive one such as the construction of a subway which may run into five, six or seven hundred thousand dollars or more, the 40% ceases to be effective because of the provision that the Board cannot contribute more than \$100,000. out of the fund to any project. The result of this is that the more burdensome the cost of the project, the greater is the share that must be carried by the railways and other interested parties, and the less, proportionately, that is borne by the Grade Crossing Fund.

In this connection, I call attention again to pp. 137 to 140 of Part II of our brief. I do not intend to read these pages as they have already been read to the Commission by Mr. Crump, but I only intend to remind the Commission that it is there pointed out that in recent years the costs of authorized projects of grade separation have reached as high as seven hundred thousand dollars, and an average might be estimated at three hundred thousand dollars. Similarly, the cost of installation of automatic protection at grade crossings averages in the vicinity of six thousand dollars.

Our brief also submits that the limitation of one hundred thousand dollars has become obsolete by reasons of increased costs of construction, and that the imposition of any fixed maximum amount is illogical and should be deleted from Section 262. If it is proper for a percentage of the cost of a grade separation to be assumed by the Grade Crossing Fund, it is manifestly unfair to prevent that percentage from being granted because of the operation of a fixed limit in the statute. The result in such a case is to throw an undue burden upon the railways.

It is our submission that there is every reason and justification in the light of conditions now, for the increase of the percentage contribution from the Grade Crossing Fund from 40% to 70%, and for the deletion of the maximum limit. While it might be said that this would cause a considerable extra drain upon the Grade Crossing Fund, I draw to the attention of the Commission the fact that there has been passed by the House of Commons within the past few days a bill introduced by the Minister of Transport to double the annual grant to the Grade Crossing Fund, increasing it from five hundred thousand dollars to one million dollars per year.

This bill also proposes to increase from \$100,000. to \$150,000. the maximum contribution permitted from the Fund. I am very far from criticising this move, and I only suggest that this Commission recommend the additional logical step of removing the restriction completely.

COMMISSIONER INNIS: That is, it will increase the contribution from \$100,000 to \$150,000?

MR. SPENCE: Yes. The bill has not passed the Senate yet; it has not become law yet. But it has passed the House of Commons.

The only other Subsection of Section 262 that we propose to amend is Subsection 5. If Section 260 is repealed as we have suggested, and if new terms are to be put into effect in respect of grants from the Grade Crossing Fund, Subsection 5 must be altered to conform, and to allow moneys that were put into the Fund on the old basis to be expended on the new one.

Now, to sum up our proposals as to these Sections, I have only this to say. The Canadian Pacific is in full accord with any move to promote the safety of the public. However, with its limited resources the Canadian Pacific, like every other railway, cannot even begin to finance any wholesale plan of grade separation or even a wholesale plan of automatic grade crossing protection. Furthermore, it does not feel that it should be called upon to finance those projects, since they have been made necessary by a development that cannot be attributed in any way to the railway. The trend being toward highway traffic, it is submitted that highway traffic should pay the costs that it has brought about.

I think that perhaps I had better end there; and I would ask the reporter to take into the record the argument on the amendments proposed by the Railway Transportation Brother-

hoods. These are self-explanatory; and with time pressing as it is, I will relinquish my place to Mr. Sinclair. I thank the Commission very much for its forbearance.

RAILWAY ACT AMENDMENT PROPOSED BY
RAILWAY TRANSPORTATION BROTHERHOODS

In the brief presented by Mr. Arthur J. Kelly on behalf of the Dominion Joint Legislative Committee of the Railway Transportation Brotherhoods, there are proposals for the amendment of three Sections of the Railway Act, Sections 179, 250 and 267.

Section 179 of the Act at present reads as follows:

"The Company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, nor remove, close or abandon any station, or divisional point, nor create a new divisional point which would involve the removal of employees, without leave of the Board; and where any such change is made the Company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby."

It will be observed that the effect of this section is to prevent the railway from removing, closing or abandoning any station or divisional point involving the removal of employees without leave of the Board and without proper compensation to the employees.

The Brotherhoods now propose to add the following subsection:

"Whenever the Company partially abandons or partially closes any station or divisional point involving the removal of employees resident at such station or divisional point, the Board shall have power to conduct a hearing upon request of the representative or representatives of such employees and to order the Company to compensate the employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby."

This proposed amendment is set out at p. 6943 of Vol. 36 of the Transcript.

In the course of the cross-examination of Mr. Kelly by Mr. Sinclair, Mr. Kelly stated at p. 7104 of Vol. 37 of the Transcript that in 1935 exactly the same amendment was submitted to Parliament and was refused. I may add that a similar proposal was introduced in the House as far back as 1932, and Hansard of that year shows that it was referred to the Railway Committee, and after consideration there it was rejected. In these circumstances, it seems fruitless to present the same question again to this Royal Commission and to ask that it be presented once more to Parliament. Parliament has already passed upon the question and that should be the end of it.

However, with the Commission's permission I might take two or three minutes to discuss some of the points raised by this proposed amendment. First, I should like to refer to the opening words, "Whenever the Company partially abandons or partially closes any station or divisional point". The meaning of the words "partially abandons or partially closes" is obscure. A station or divisional point

is either abandoned or it is not abandoned, but I submit that it cannot be "partially" abandoned. If those words were placed in the Act the result would be that every reduction, no matter how small in the staff employed at a divisional point, would be open to the interpretation that it was a "partial abandonment" or "partial closing" of that divisional point. There would be no logical place to draw the line and the railway might be faced with claims every time it altered a train schedule or moved a man. That would, of course, be an unreasonable result, and to do justice to Mr. Kelly, he protested in his evidence that he had no such intention. Nevertheless, the intention of the proponents would have no effect once the words were in the Act and subject only to the strict legal interpretation of their meaning.

Mr. Kelly was able to bring forward in his evidence only one single example of what he claimed to be a hardship that had resulted from the present wording of Section 179 and that case arose thirty years ago out of the amalgamation of the Canadian Northern and the Grand Trunk Pacific. In discussing it Mr. Kelly stated that employees who were property owners had suffered due to a decrease in value of their property when the railway operations at the divisional point had been diminished. Evidently then, his proposal would be to require the Board to investigate the fluctuations in values of real estate that might or might not be caused by variations in the amount of railway work performed at a divisional point. There is no doubt that that would be an entirely new sphere of activity for the Board, and I suggest that it is not one which the Board should reasonably be required to undertake in the course of its administration of the Railway Act. Possibly the Board would in the course of its present duties under Section 179, undertake to assess

compensation for property loss due to complete closing of a railway centre, but that is a very different matter from attempting to place a valuation upon changing property values due to a mere readjustment of railway activity at the point in question.

If a principle of this kind were to be adopted, it should work both ways, so that if the railway added a train and increased the work at the divisional point, the employees should pay the railway the increased value of their properties. This is, of course, an absurd result and one for which the railway would never ask, but it nevertheless follows logically from the proposal that Mr. Kelly makes.

The fact is that railway employees are very well protected now by Section 179 as it stands. They are also protected by having their expenses of moving and settling in another location paid by the railway when their moves are occasioned by necessities of railway operation. I submit that in this respect they are already safeguarded more fully than labor in any other class of industry.

When a man enters the railway service, he does it in the knowledge that he is likely to be moved from place to place. That is one of the understood conditions upon which he accepts employment. That is also one of the reasons why he is paid more than he would be in other industries, and one of the reasons that at many divisional points the railway itself owns houses and supplies them to its employees at very moderate rentals.

I submit that the employees of the running trades are already very fortunate in the provisions that are made for their welfare not only in the Act but by the railways themselves, and that there is no need for the Commission to reopen again with Parliament this proposal which has already been considered and rejected.

SECTION 250

The second proposal for amendment of the Act suggested by the Brotherhoods relates to Section 250 which provides for overhead clearance on the railway. Subsection 1 of the present Section 250 requires an open and clear headway of at least 7' between the top of the highest freight car used on the railway, and the lowest portion of any bridge or other overhead structure.

Subsection 2 permits the Board to require any existing structure to be altered so as to comply with these requirements.

Subsection 3 requires the space between the rail level and the lowest portion of an overhead structure to be not less than 22'6".

Subsection 4 gives the Board power to require alteration of any overhead structure even if it is not owned by the railway, and Subsection 5 permits the Board to exempt any structure from the operation of the Section.

Now, it will be noticed that this Section has two separate and distinct requirements as to overhead clearances. The first one is that the clearance must be at least 7' above the top of the highest freight car, and the second one is that the clearance must be at least 22'6" from rail level.

Another point to notice is that Section 250 speaks only of overhead clearances and says nothing about side clearance.

The proposals of the Brotherhoods are set out at p. 9645 of Volume 36 of the Transcript. They are, in effect, that side clearances should also be dealt with in the Section; that there be some rationalization between the 9' requirement and the 22'6" requirement, presumably by striking out the 22'6" requirement altogether, that there

be some new provisions as to intermediate distances between tracks, and that men be not required to ride upon the tops of or sides of cars where restricted clearances exist.

Dealing first with the overhead clearance question, I must say that Mr. Kelly's evidence does not seem to give any satisfactory explanation of what his objection is to the present situation. While he desires that in all cases the 9' clearance over the tops of freight cars be maintained, he seems to be under the impression that the 22'6" requirement from the base of the rail may be applied notwithstanding the fact that it might in some cases reduce the headroom over the tops of cars to less than 9'. I suggest that this is not the proper interpretation of the Section but that both Subsections contain absolute minimum requirements, subject, of course, to relief being granted in specific cases by the Board. If this is so, Mr. Kelly need have no fear of conflict of one Subsection with the other; the railways must observe both requirements under the Act as it stands, and if we used the cars that were so high that the headroom of 9' would not exist, then structures under which they were operated would have to be raised above 22'6" required by the other Subsection. In these circumstances, I suggest that as far as overhead clearances are concerned, Mr. Kelly's fears are groundless and there is no need for a change in the Act.

As to side clearances, there is no specific provision in the Railway Act, and the matter is left under the general powers of the Board, such as Section 287, to make rules and regulations in respect of safety. The Board has covered the matter very well by its General Order No. 236, and I submit that there can be no cause of complaint on this score. So many factors enter into a decision as to what is a proper clearance at a particular location, that it would be impracticable to lay down an inflexible

rule in the Act as to side clearances, and I suggest that it is for the very reason that Parliament has left the question within the Board's discretion. The Board has engineers and inspectors, usually drawn from the ranks of those who have had years of railway operating experience, who examine every case in which there is any restriction in side clearances. The plan of every structure proposed to be erected on or near the railway involving a restricted clearance must first be submitted to and approved by the Board, and I may say that the Board has been extremely exacting in the application of its rules and regulations in this respect.

The Board also requires warning signs to be erected close to any points at which danger may be anticipated from restricted clearances, and it insists in every case that the railway give an undertaking, which the Board embodies in its Order, that the railway shall in operating past restricted clearances keep its men off the sides and tops of cars. The railway, in turn, issues instructions to its men which are embodied in its timetables and strictly enforced, that they must not ride on the tops or sides of cars at such points. I think it is safe to say that no accident ever occurs at a point of restricted clearance which is not caused directly by the disregard of the employee for the rules and precautions of the Board and the Company.

It is difficult to see how any improvement whatever could be made in this situation by a change in the Act. Mr. Kelly does not suggest in his brief exactly what amendment he had in mind, but I suggest that any amendment that would have the effect of imposing a rigid rule instead of leaving to the Board a discretionary power to deal with individual cases of danger might increase the hazard rather than reduce it.

SPACING OF TRACK CENTRES

Another amendment of Section 250 that Mr. Kelly suggests, without however, giving any indication of how the amendment should be framed, relates to the rearrangement of tracks in order to give adequate space between them. This again is a matter with which the Board now has full power to deal and which it does deal with very effectively, and in the opinion of the railways, very strictly. There are, of course, a few cases in Canada in which it is impossible to increase the distance between tracks because there is no room to spread the tracks farther apart, and the requirements of traffic simply make it impossible to take up one of the tracks. Even in cases of that kind the Board makes very close enquiry to be certain that extra land cannot be acquired or structures moved or demolished to make way for a broader right of way, and it is only where no reasonable possibility of creating a better lay-out can be found that the Board will permit restricted distances to be made between tracks. Surely some flexibility must be permitted for the purpose of allowing for cases of this kind, and I cannot suggest what improvement could be made in the situation by amending the Section. Apparently, Mr. Kelly has not been able to determine, either, just how the improvement should come about, as he has not submitted any wording for the amendment. It is my submission that in this respect the present ~~xx~~position is as satisfactory as it can be made and no change should be made in the Act.

SECTION 267

Section 267 of the Railway Act at present reads as follows:

"Sign boards at every highway crossed at rail level by any railway shall be erected and maintained at each crossing, and shall have the words 'railway crossing' painted on each side thereof in letters at least 6" in length.

2. In the Province of Quebec such words shall be in both the English and French languages."

Mr. Kelly proposes at pp. 6945 and 6946 of Vol. 36 of the Transcript that there should be two sign boards instead of one at each crossing, and that they should be reflectorized by means of some such device as reflector buttons.

It is our submission that this provision would cause a great deal of extra expense for the railways without any appreciable added protection to the public. As the Commission knows, sign boards now used are painted white with black lettering and they are placed so prominently and are of such distinctive shape that they cannot be missed by anyone who is keeping a proper lookout. Mr. Kelly's point seems to be that there should be one on either side of the track so that when a train is on the crossing the sign will not be obscured from view. Our answer to that is, of course, that if a motorist is able to see the sign, he will be able to see the train on the crossing, and the sign will add nothing to his warning. Thus a second sign, even if reflectorized, would not justify the expense of its erection.

I am not altogether satisfied, however, that Mr. Kelly's proposal, as stated in his brief, expresses fully the intention of the Brotherhoods in this matter. In one discussion that the Brotherhoods and the railways had with the Board of Transport Commissioners on the subject, it developed that what the Brotherhoods had particularly in

mind at that time was some regulation of the Board or amendment to the Act that would require road authorities (presumably including the Crown) to install in suitable cases what are known as advance warning signs on either side of the crossing some two or three hundred yards back from the crossing on the highway.

There have been a number of cases before the Board in which it has appeared that such signs would be desirable, but the Board has held that it had no authority to order the municipality or the highway authority to install such signs. The Board feels that in such cases its jurisdiction extends only to the boundaries of the right of way. If Mr. Kelly means an amendment of the Act to give the Board added power in respect of advance warning signs, I am whole-heartedly in support of his proposal. In fact, this is an amendment that we ourselves have in mind for submission to Parliament at some appropriate time in the near future. We have not submitted it to the Commission because there are so many broad and complex issues before you for decision that we have not thought it proper to occupy your time with a number of these comparatively minor proposals for amendment of the Act.

(Page 23490 follows).

ARGUMENT BY MR. SINCLAIR

May it please the Commission: I propose to address myself to three subjects:

First: Just and reasonable rates and the fixing of such rates in general revenue cases by the rate base--rate of return technique.

Second: Traffic matters generally and in particular arising out of Clause 2(b) of Order in Council P.C.6033, except the subject of "Horizontal Increases" and also that of "Industrial Location and the Rate Structure", both of which have been covered by Mr. Evans.

Third: A national transportation policy for Canada, including the views of Canadian Pacific as to other media of transport competing with the Railways.

The way I have prepared my notes, my lord and members of the Commission, is that at the commencement of each subject I have taken the references from the transcript to the direct, cross-examination and re-examination of the various witnesses. Therefore at the commencement of each subject there are together the various parts of the transcript where the material is dealt with. I do not intend to read these various references in my argument. I have put them there in case someone later wishes to have them available to check.

Just and Reasonable Rates
Rate Base
Rate of Return

The written submission and evidence of Canadian Pacific will be found at: Exhibit 139A, pp. 64-69 (Part I of written submission); Mr. Liddy - Vol. 85, pp. 16606-12; pp. 16628-62; Vol. 86, pp. 16750-64; Vol. 87, pp. 16884-89; Vol. 88, pp. 17030-46; Vol. 89, pp. 17153-57; pp. 1720-14; pp. 17234-38; Vol. 90, pp.

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are in agreement with the experimental facts.

The second part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the elements of the periodic table. It is shown that the theory of the structure of the atom can be used to explain the periodicity of the properties of the elements, and that it can be used to predict the properties of the elements which have not yet been discovered.

The third part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the compounds of the elements. It is shown that the theory of the structure of the atom can be used to explain the properties of the compounds of the elements, and that it can be used to predict the properties of the compounds which have not yet been discovered.

The fourth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the solutions of the elements. It is shown that the theory of the structure of the atom can be used to explain the properties of the solutions of the elements, and that it can be used to predict the properties of the solutions which have not yet been discovered.

The fifth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the solids of the elements. It is shown that the theory of the structure of the atom can be used to explain the properties of the solids of the elements, and that it can be used to predict the properties of the solids which have not yet been discovered.

17281-97; 17312-64; Mr. Thompson - Vol. 91, pp. 17474-86; ' Vol. 92, pp. 17591-94; pp. 17620-24; pp. 17640-42; Mr. McDougall - Vol. 94, pp. 17825-62; Vol. 95, pp. 17945-60; Mr. Northey Jones - Vol. 111, pp. 20416-19; Vol. 112, p. 20446; pp. 20462-67; pp. 20492-93, pp. 20522-40; Vol. 113, pp. 20573-76; Mr. Norman - Vol. 113, pp. 20633-4; pp. 20699-700; pp. 20702-10; Vol. 114, pp. 20718-23; pp. 20809-11.

I do not intend to discuss at this time the words "just and reasonable" as applied to individual rates. This matter was most thoroughly gone into a number of times during the proceedings and the factors the Railways take into account in fixing rates and the jurisprudence of the Board fully developed. You will recall that there is no precise formula. Differing factors are given different weight, depending on the particular circumstances and conditions. I should like to say that the law in the matter is to be found in Mr. Evans' remarks in Volume 87 of the transcript, pp. 16842-59.

The point I wish to direct my attention to at this time is "just and reasonable" as applied to the general level of rates. I submit investment in railway property and the return on that investment is of the utmost importance in fixing the general level of rates.

The Board by Section 325 of the Act is under a duty to fix, determine and enforce just and reasonable rates and to change and alter rates as changing conditions or cost of transportation may from time to time require. The Board must determine what is a just and reasonable general level of rates which Railway Companies may charge for the carriage of persons and goods. This long-recognized duty of the Board has been recently reaffirmed

by the decision of the Supreme Court of Canada in Canadian Pacific v. Alberta, et al, which was decided in December of last year, reported in 64 C.R.T.C. 129.

If, in the public interest, Canadian Pacific is to continue as a privately owned system, and I submit it should so continue, then the capital invested in Canadian Pacific must be protected and additional capital attracted to the enterprise.

The principles governing the Board in determining what are just and reasonable rates are clearly set forth in the Board's judgments. The basic principles are established and recognized. These principles, I submit, can be summarized in this way: Both the public and the Railways must receive fair treatment in the charges which are to be assessed. For this to be possible, rates should not be held so low as to be unremunerative to the Railway and so fail to provide a fair and just return which is essential to enable a Railway to generally maintain its credit and standing in the financial world. Furthermore, a Railway must be able to attract investment and to render Railway securities marketable. In support of this I would like to refer to extracts from three judgments of the Board.

In my summary I have tried to lift the language from these extracts in summarizing the duties of the Board.

Manitoba & Saskatchewan v. Railway Association of Canada
(1920) 26 C.R.C. 298.

This case arose when Manitoba and Saskatchewan, following a reference by the Governor in Council back to the Board of the 40% increase, asked the Board to suspend or vary the increase. The application of the Provinces was refused. Mr. Commissioner Rutherford, delivering

judgment for the Board, said at p. 301:

"The fact that under the law the railways as public utilities are required to have their rates approved by the Board, does not justify the view that they should therefore be compelled to do business at a loss.

"Further, if the rates fixed are not fair and reasonable to the railways as well as to the public, the public will suffer inasmuch as no railway compelled to operate on a non-paying basis, can furnish either efficient service or adequate facilities for the handling of traffic."

And further, he stated at p. 307:

"It will, I think, be admitted that an honestly organized and efficiently managed railway should be in a position to earn annually over and above its operating expenses and cost of maintenance, such a sum as will enable it to pay its interest and other proper charges and generally to maintain its credit and standing in the financial world."

In the Western Freight Rates Case (1914) 17 C.R.C. 123, Chief Commissioner Sir Henry Drayton said, at p. 178:

"Extensions of service, betterment of facilities and the enlargement of terminals have from time to time to be made often in the old settled districts of the country, and apart from any question of fairness to the railways themselves, but as a matter of public policy, railway rates should be rates of such a character as to attract investment and to render railway securities marketable."

In the General Freight Rates Investigation (1927) 33 C.R.C. 127, Chief Commissioner McKeown expressed it this way at p. 135:

"There is no occasion to labour the question that the railways must receive sufficient revenue to efficiently operate, to provide for all legitimate needs, and to make fair return to those whose money is invested in such business undertaking. The duty of the Board in this regard is recognized and was openly expressed even by those who in individual instances have asked for decrease in tolls levied upon themselves or their business."

I submit, my lord, that my summary on page 3 of my notes is amply supported by these extracts.

Mr. Carson has covered the serious problem which the Railways face in attempting to have rate applications determined quickly and he has expressed the view of Canadian Pacific as to certain amendments to the Act which we submit are essential to alleviate this difficulty.

I submit that a statutory direction to the Board which would require use to be made of the rate base - rate of return technique as applied to Canadian Pacific, will also be of great benefit to the Board, to the public and to the Railways. I submit that you should recommend to Parliament that it give guidance to the Board in general revenue cases, by having as a section or subsection of the Railway Act that -

"Rates shall not be deemed to be just and reasonable unless, taken as a whole, they are sufficient to provide a fair return upon the investment in the railway property of Canadian Pacific Railway Company and the

Board may fromtime to time determine the investment in railway property upon which the return is to be calculated and the rate of such return."

THE CHAIRMAN: That is the very wording you are proposing?

MR. SINCLAIR: That is right. What I now propose to do is to develop what it means, to meet suggestions that have been put forward by the provinces, to discuss the principles that govern regulatory tribunals in dealing with rate base-rate of return techniques in dealing with the general level of rates. I will also have something to say why the requirements base is not a satisfactory one for fixing the general level of rates.

The position of Canadian Pacific as to the necessity for a fair return on the investment in railway property is succinctly stated in Paragraphs 42, 43 and 44 of the Outline Submission and which are found at p. 64 of Part I. At this time I will only read paragraph 43:

"43. The present jurisprudence in public utility regulation holds that historical book records of investment are the best evidence for establishing a rate base. The necessary data in regard to the investment of Canadian Pacific is available in the records of the Company. No need, therefore, exists for a prolonged and expensive investigation into the value of the property used in transportation service."

Under the Railway Act today there is no specific direction which would require the Board to consider the return on the Canadian Pacific investment in rail property in determining a just and reasonable level of rates. I submit the requirements method is too uncertain and

contentious to be a fair or equitable method of determining the general level of rates.

THE CHAIRMAN: Pardon me; you refer on page 4 to the general freight rates investigation of 1927.

MR. SINCLAIR: Quite so.

THE CHAIRMAN: And what Commissioner McKeown said. Did he act on that? Were rates at that time handled on that basis?

MR. SINCLAIR: Of course that was not an increase case. That was an investigation as to differences in rates. When you say did they act on that, in the 21% case, my lord, if you take the rail property investment of Canadian Pacific of \$1,001 million and relate to that the \$52 million which the Board found you get a return of around 5.2. If you take that and relate it to the review that was provided in the judgment of the majority in the 8% case you will find that they reduced the \$52 million to \$47 million which returns about 4 3/4% on the rail property investment of say \$1 billion odd. My contention, of course, my lord, is that that is not a fair or equitable return under the circumstances that exist today. I will have more to say about what the Board did in the 21% case and what the Board did in the 20% case later in my argument. I just think that possibly I was a little cryptic here when I referred to the requirements method as being too uncertain and contentious. I think I should say that the reason why in my view it is uncertain and contentious is that the actual level of fixed charges is given undue weight. The reduction of fixed charges at the expense of the shareholder, for example, through the use of surplus or other funds, enures wholly to the freight payers. For example, in 1949 --

THE CHAIRMAN: You are not reading from your brief?

MR. SINCLAIR: No. I am just expanding this because I felt it was rather necessary. When I was reading it over it looked to me to be a little cryptic. For example, in 1949, as shown in Exhibit 268, the report for 1949, at page 13, Canadian Pacific had certain funds in the steamship replacement fund. It took \$10.7 million to redeem a 4% collateral trust bond issue. In that way they reduced their fixed charges, and on the requirements base, taking the fixed charges outstanding, and having that made as the criteria of setting up what is fair and reasonable, there is an example of where \$10.7 million, if that had been left in the steamship replacement fund or used for non-railway purposes, would not have reduced the requirements. The money in that case went to reduce the burden that the company would rightfully have passed on to the freight payers if they had not used this fund, which the freight payers did not build up, and which was other than railway moneys. It is contentious also because it leads to unnecessary disputes as to what is Other Income, and the apportionment of dividends. There are many other reasons but I think those are examples. I think it is worthy of considerable note that Mr. MacPherson during the proceedings (Vol. 89, p. 17213) very frankly stated ". . . sooner or later the question of rate base, in fairness to everybody, will have to be determined". I wish to emphasize that.

In Canada, railway requirements have been the primary method used in revenue cases, with Canadian Pacific being taken as the yardstick. That is not to say that rate base and rate of return has not been put forward for consideration. In the 21% Case the Canadian Pacific did not ask the Board to establish a rate base or determine a rate of return but put forward the view that the reasonable-

ness of the requirements as claimed should be tested by looking at the return which would be provided on the rail property investment.

In its judgment (page 24 of the print) the Board, after noting the position taken by the Railways, said:

"I think, however, that we might appropriately have some regard to the rate of return on the amount invested by the railways in railway property used in transportation services, as a test by which the reasonableness of the rates may be judged. One difficulty, however, is in ascertaining the value of the railway properties so used in transportation service."

That is the first time the word "value" has come up, and I would like to make it clear, my lord and members of the Commission, that when you use "value" in relation to the rate base and rate of return technique you are not using it in its ordinary sense. The regulatory body makes value in a rate base-rate of return technique case. It does not find value. For instance, in reorganization proceedings to recapitalize a railway under the bankruptcy law of the United States, Section 77, ~~thi~~ the duty is to find the value of railway properties. When you are using the rate base-rate of return technique you make value, and it has no connection with exchange or market value in that sense.

THE CHAIRMAN: After the adjournment you will tell us the difference between making value and finding it.

---The Commission adjourned at 1.00 p.m. to resume at 2.45 p.m.

Ottawa, Ontario.
May, 22, 1950. Monday.

AFTERNOON SESSION

MR. SINCLAIR: Before the adjournment, my lord and Commissioners, we were discussing the question of value and what it means in regard to its use in the rate base-rate of return technique, and I was making a distinction between the use of the word "value" in reorganization proceedings where you were finding value.

THE CHAIRMAN: Yes; one was finding value, and what was the other?

MR. SINCLAIR: Making of value. For instance, take the case of expropriation, eminent domain cases. In those cases the earning power of the property is a factor.

THE CHAIRMAN: In what cases did you say?

MR. SINCLAIR: Cases of eminent domain. During Mr. Shepard's argument Dr. Angus put to him the reason why you could not give effect to earning power in arriving at a rate base, because you were then in a cycle, you were following a circle and of course that is true, because what would happen would be that you .. would be finding value based on earnings, and the body that was fixing what your earnings were would be the same body that was finding your value, so you would be in .. what might be called a circular dogtrot.

It has been made very clear in a number of texts, and I shall not take time to refer them all, but practically every book that deals with this subject deals with the distinction. For instance, Dr. Locklin, at page 273, says this:

"Thus the Supreme Court finally came to recognize that in a valuation proceeding for rate-making purposes

commission or court is not finding value it is deciding what the value ought to be. In so far as rates can be adjusted to yield a fair return on such value, the commission or court is making value, not finding it. Much confusion of thought can be avoided if this point is kept in mind."

THE CHAIRMAN: Does he go on and tell us how they make value without finding it?

MR. SINCLAIR: Oh, yes, and I propose to discuss that, my lord.

THE CHAIRMAN: All right.

MR. SINCLAIR: To a similar effect, Dr. Bigham's book, "Transportation Principles and Problems", at page 246, in one sentence points it up, my lord; he says:

"When rates are fixed earnings are limited and value is made, not found."

Now, of course, in the 21% Case there were certain difficulties. For instance, we did not have a split balance sheet; the assets side of our balance sheet have not been divided, and our accruals for depreciation had not been brought to the level they are now at. These are matters that no doubt the then Chief Commissioner had in mind when he made the statement he did that I read into the record before lunch.

THE CHAIRMAN: What you are asking for in your amendment is a return on your investment.

MR. SINCLAIR: Quite so.

THE CHAIRMAN: Now, can you assimilate that to making value or finding value?

MR. SINCLAIR: Yes, my lord.

THE CHAIRMAN: Which?

MR. SINCLAIR: It is, of course, making value, because what we are asking is that it should be the invest-

ment in railway property upon which the return is to be calculated. I think that is of the utmost importance, in view of some of the remarks that were made particularly by Mr. Smith during his argument, but I am going to try to meet them later on, my lord, if I may. I do, however, want to stress that it is the investment in railway property upon which the return is to be calculated.

In the 20% Case, on the other hand, Canadian Pacific did ask the Board to establish a rate base for Canadian Pacific and to determine a rate of return. Mr. J. C. Gilmer, the General Auditor of the Company, prepared statements which showed the Company's investment in rail property, both gross and net. The material filed as an exhibit in that case is Exhibit 196 in these proceedings. It was prepared in collaboration with Price, Waterhouse & Company, the auditors of our Company, and also in consultation with Mr. James C. Thompson, who was a witness in these proceedings, and Mr. Paul Grady, an outstanding United States' accountant. Both Mr. Thompson and Mr. Grady gave evidence that Exhibit 196 was prepared in accordance with sound accounting principles (20% Case, Vol. 812, pp. 2695 and 2730).

Now, Mr. MacPherson during his argument made reference to the fact that Mr. Grady would not vouch for the figures in Exhibit 196, or what we also refer to as Exhibit 49-49. Naturally he would not; he did not prepare it. All he would say - and I have given the page reference in the 20% Case, and I think it should have been sufficient - was that it was prepared in accordance with sound accounting principles. And I do not think there is much in the point that Mr. MacPherson made in regard to that before the Board and repeated to you again in his argument.

As to the rate of return which the Company should earn we called Mr. Northey Jones, - this is in the 20% Case, but he again was a witness in these proceedings - a partner of Morgan, Stanley, and Dr. H. B. Dorau, both of whom from training and experience were eminently qualified to give evidence as to what would be a fair rate of return for Canadian Pacific.

I should point out that Mr. Gilmer (20% Case, p.1106-7) stated in evidence that the Company's property investment account was substantially understated by reason of the effect of the practice of renewal accounting. Both Mr. Grady (p. 2696) and Dr. Dorau (20% Case, p. 2868) stated that the book investment which Canadian Pacific put forth as its rate base was the "minimum" and "lowest conceivable" rate base to be employed.

I think that is a statement that I would like to emphasize, and why they said that I think is of interest. They said it was the "minimum" and the "lowest conceivable", and one reason for them saying that was the Company had down until 1942 practiced renewal accounting for road property and shop and power plant machinery. Also, the books of Canadian Pacific now reflect what may be considered full or more than full past and accrued depreciation. I think that is of importance, because the Canadian Pacific in that regard is unique among railway companies in North America. The third point that I wish to make is that the Company has operated from its inception as one entity. Now, there were other reasons, but those, as I read their evidence, were the three basic reasons.

THE CHAIRMAN: Do you mean they are not in your written argument?

MR. SINCLAIR: No; there is quite a bit of--

THE CHAIRMAN: What are the three again?

MR. SINCLAIR: One is the practice of renewal accounting for road property and power and shop machinery down until 1942. The second one is that the books reflect full or more than full past accrued depreciation; I think Mr. Liddy's evidence, if I recall it, was something like 47%. And the third one is that we had operated from our inception as one entity. Those all have, of course, a very material effect, my lord, on what the property investment account shows.

THE CHAIRMAN: That is how you make your value, is it?

MR. SINCLAIR: Yes. We take our value to be the book investment in rail property as shown in the books of the Company.

Now, for the three reasons I have just given, among others, that is an extremely low base; it is the minimum, in the words of these experts, or the lowest conceivable, in the words of Dr. Dorau - I think he used that expression - and I think Mr. Grady used the word "minimum."

I bring this to the attention of your Commission only because I am at a complete loss to understand, in view of the evidence, the finding of the Board in its judgment of September 20, 1949 (p. 15 of the print) that -- "much more evidence than that adduced will be necessary to justify this Board in deciding a rate base had been established for the purpose of dealing with this application".

It must be remembered, of course, my lord, that Section 21 was in the Act.

THE CHAIRMAN: You say that is on page 15?

MR. SINCLAIR: Yes, my lord. I quote it at page 7 of my notes.

THE CHAIRMAN: Is it beneath that heading of "Conclusion"?

MR. SINCLAIR: No, it is right above that.

THE CHAIRMAN: You said September 20?

MR. SINCLAIR: I said the 8% Judgment, yes. It is right above that, my lord. It is the last sentence. I will read it all;

"Notwithstanding, therefore, the very able and learned arguments advanced by counsel for the Canadian Pacific Railway and notwithstanding the evidence of the learned experts, I accept the arguments advanced for the Province of Saskatchewan and the Maritime Transportation Commission that much more evidence than that adduced will be necessary to justify this Board in deciding that from this exhibit and the evidence in its support a rate base had been established for the purposes of dealing with this application."

THE CHAIRMAN: That is the exhibit where you show your investment as one billion --

MR. SINCLAIR: One billion and one million, yes, my lord. As I say, we introduced this evidence --

THE CHAIRMAN: Then did they discard the whole thing and proceed on a different basis?

MR. SINCLAIR: They went on a requirements base, of the my lord. In spite, I say, of the fact that Section 21 was in the Act and Section 69(1) was in the Act, and if the Board was not satisfied with the evidence that was adduced, they had the right to put their own experts on the case and to make such investigations as they felt were warranted.

THE CHAIRMAN: Now, if the amendment which you propose is adopted, the Board in the future would proceed that way?

MR. SINCLAIR: They would be required to do so, my lord, and that is one of the reasons, as I will submit later, why I think this is necessary - that and other reasons which I will come to.

What I wish to submit now is that there should be statutory guidance so that in future the Board will not be in any doubt as to the necessity of considering a rate base and a rate of return as applied to Canadian Pacific.

Canadian Pacific is firmly of the view that the most expeditious and satisfactory method of determining a just and reasonable level of freight rates is on the basis of a fair return on a reasonable rate base. The rate base - rate of return technique is the accepted technique in the regulatory commissions in the United States and is the method followed by the Board of Transport Commissioners in exercising its control over a number of other public utilities within its jurisdiction.

For example, the B.C. Telephones, Ottawa Electric Railway, Bell Telephone.

THE CHAIRMAN: Is there investment on the basis --

MR. SINCLAIR: Not the Bell Telephone, I am sorry; the B.C. Telephone and the Ottawa Electric.

THE CHAIRMAN: What is the basis there?

MR. SINCLAIR: Well, in the Ottawa Electric case it is gross investment. The B.C. Telephone case, the last case is still under judgment; there was very extensive evidence submitted regarding rate base.

THE CHAIRMAN: You mean investment?

MR. SINCLAIR: Yes. They called, for instance, Dr. Foster, who is an associate of Dr. Dorau's who gave

extensive evidence on behalf of the Company. I believe that one of the witnesses in these proceedings was advising on the accounting on that. I think Mr. Lionel Kent was advising the B.C. Telephone Company in regard to that, and I think the whole case is based on a rate base-rate of return technique and on investment figures.

There are a number of methods of determining the rate base upon which to calculate the rate of return but I would submit that it is practically universally recognized that in developing a rate base the choice lies between the actual cost method and the replacement cost method.

For instance, I have ruled out there---

THE CHAIRMAN: Then under your amendment the Board would have those two methods they could select from?

MR. SINCLAIR: Well, they could find our investment--

THE CHAIRMAN: You say the Board may determine the investment in railway property.

MR. SINCLAIR: Quite so.

THE CHAIRMAN: They would be free, then, to adopt any method they liked?

MR. SINCLAIR: Quite right.

THE CHAIRMAN: These are the two principal ones.

MR. SINCLAIR: Yes. I have ruled out market value or exchange value, for the reasons that I was talking about earlier, that is, that the rates fix so much the level for market value and the level for exchange value.

THE CHAIRMAN: Are you leaving any remedy to yourselves in case you do not agree with the Board on their findings, on their determination of your investment?

MR. SINCLAIR: Quite so, my lord. I think I may as well deal with that now. There has been a lot said during these proceedings about the constitutional guarantees under the American Constitution - that is,

the fifth and fourteenth amendments - and there seems to be a thought that that puts the American public utility in a rather different position from that of a utility in Canada. Now, I submit that that is not right. I submit that under the law here you cannot take property without compensation unless --

THE CHAIRMAN: What law do you mean?

MR. SINCLAIR: Canadian law; under the Railway Act, for instance. - unless the Statute clearly states that and states it unequivocally. For instance, there is the Florence Mining Company case, the famous case of Florence Mining Company, that went to the Judicial Committee, and which has the famous statement of Mr. Justice Riddell in it, that "thou shalt not steal" does not apply to the King. That was a case where the statute clearly and unequivocally stated that they could take title to the Florence Mining Company's lands.

There are a number of cases. For instance, Halsbury, Vol. 31--

THE CHAIRMAN: What is that?

MR. SINCLAIR: In support of the proposition I am putting forward: Halsbury, Volume 31, page 504, I would just like to read that:

(Page 23510 follows).

"An intention to take away the property of a subject without giving him a legal right to compensation for the loss of it, is not to be imputed to the Legislature unless the intention is expressed in unequivocal terms."

THE CHAIRMAN: Well, that is the whole thing. There is no constitutional guarantee binding the Legislature.

MR. SINCLAIR: Quite, but I say that in the Railway Act it is directed that just and reasonable rates are to be fixed, and that is the negation of taking property without compensation. When you ask me what remedy I have left to me, I have the remedy, of course, that if I could prove that the rates fixed were an unjust taking of Canadian Pacific property without compensation, then I could have that rectified. But I don't think that will be a difficulty.

THE CHAIRMAN: Do you think you could safely leave this to the Board to dispose of?

MR. SINCLAIR: I definitely do, but I think they have to have a direction. I think the time has come when we have to have statutory direction in regard to this matter.

THE CHAIRMAN: Oh, yes, if your amendment is adopted, you will have the statutory direction.

MR. SINCLAIR: Quite so.

THE CHAIRMAN: But it is in that case, I am just asking you whether you consider you are sufficiently protected when you say that the Board from time to time may determine the investment in railway property.

MR. SINCLAIR: Quite so. I am quite prepared, my lord, to make out a case before them and to feel

confident that we could establish a proper rate base.

COMMISSIONER INNIS: You think Parliament would be willing to give the right to the Board, particularly as its decisions would affect Canadian National deficits?

MR. SINCLAIR: I think they have got it now; I think the Board has it now, and after all, Dr. Innis, the fair return on a reasonable rate base of Canadian Pacific can be the minimum. So they would have to have the maximum and if the Canadian Pacific required some - -

THE CHAIRMAN: The Board have the power now, but they said they did not have sufficient evidence to use.

MR. SINCLAIR: That is what they said.

THE CHAIRMAN: That is to say, much more evidence than that which it has will be necessary.

MR. SINCLAIR: Quite so, and I say I cannot understand a finding like that.

THE CHAIRMAN: Well, I just refer to it to show that they do not consider they have not the power,

COMMISSIONER ANGUS: Mr. Sinclair, your use of the words "maximum and minimum", the question occurs to me (you may be going to deal with it later and I don't want to interrupt), but would a system of rates fixed on a rate base and rate of return in the case of one railway, one enterprise, leave room for incentive; would it be a sort of fixed income? I am contrasting three things: Government ownership,^a/closely regulated privately owned utility, and a private enterprise utility. It seems to me that the characteristic of the private enterprise utility lies in this matter of incentive; profits are bigger if they do their job well, than if they do not do it quite so well.

MR. SINCLAIR: Quite so. I believe I have something

on that, Dr. Angus, and when I come to it, if I have not cleared it up, I would be pleased if you would draw my attention again.

COMMISSIONER INNIS: Don't you think you are dismissing market values rather cavalierly.

MR. SINCLAIR: I think not, Dr. Innis. I think, having looked at these American texts, there are a great number of them where they have spent a lot of time on this problem, and without exception they brush it aside. I will refer to the case of the B.C. Electric when it was before the Dr. Carrothers Board in British Columbia where they brushed it aside.

COMMISSIONER INNIS: To put it another way, suppose the Government were to offer to buy out the C.P.R. (that horrible prospect which is held before it from time to time) would you be willing to accept the one billion one?

MR. SINCLAIR: Well, of course, no, Dr. Innis. That points up the very distinction I made. I say that the Canadian Pacific to date is worth very many hundreds of millions of dollars more than the one billion one.

COMMISSIONER INNIS: As long as you set a rate base to that effect, you are leaving yourself open - -

MR. SINCLAIR: No, the only reason, or the main reason why I depart from the reproduction cost base is because of the tremendous expense and contention that is involved in it. There is no doubt about it that from an economic standpoint (and I think Dr. McDougall pointed that out, and I quote it later) that the fairest method is the reproduction cost. That is because it gives effect, as I say here, to changing dollar values. I certainly, of course, would not be prepared, if I

owned it, to sell the Canadian Pacific for one billion one, nor would I be prepared to sell it for the replacement cost of it, because I think it has tremendous value as a going concern, and I would want to add something on for the --

COMMISSIONER INNIS: No doubt you will come to this later on?

THE CHAIRMAN: You refer to this B. C. Electric Case. You are going to come to that?

MR. SINCLAIR: I am going to come to that, my lord.

THE CHAIRMAN: All right.

MR. SINCLAIR: The present value of the dollar is, of course, given effect to in the replacement cost method and this is one of the strongest arguments in its favour because it is recognized that weight must be given to changing dollar values. However, weight can be given to such changing values of the dollar under the actual cost method of evaluating rate base by reflecting this feature in the rate of return and later I will deal with this further.

Before discussing the two methods of valuation of rail property investment, I wish to make it clear that Canadian Pacific is not asking your Commission to find a specific rate base or a specific rate of return. Canadian Pacific submits that both of these matters are matters for the Board of Transport Commissioners, which will make the necessary findings on the material and evidence which would be developed before them and under their direction.

First, I wish to spend a moment on matters that were discussed in connection with the rate base of \$1,001,000,000 which was put forward by Canadian Pacific

in the 20% Case and to which reference has been made in these proceedings. These two matters are the property secured through so-called donations and grants arising from the construction and operation of Canadian Pacific, and the matter of the understatement of rail property investment in the accounts of the Canadian Pacific, because until 1942 the system of renewal accounting was followed for shop and plant machinery and road property. Both of these matters were commented upon by the Chief Commissioner in the 8% interim judgment, commencing at the bottom of page 14

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of the print, and were reasons why, in the Chief Commissioner's view, the Board could not accept "Exhibit (49) - 49 (Exhibit 196 in these proceedings) for a rate base determination". Those were both points that were discussed by my friend, Mr. MacPherson, both here and before the Board, and I think were also referred to by Mr. Smith.

On the matter of property secured through donations and grants, I wish to make it clear that Canadian Pacific in proving a rate base would strongly contend that it is the property used in providing transportation service which must be taken into account in establishing a rate base, irrespective of whether such property was transferred pursuant to a contract and without cash consideration or purchased with moneys realized from assets earned under any contract with the Dominion, a Province or municipality, or whether the property was purchased by the Company through money secured from the sale of securities or by using surplus. Our position is made clear in Mr. Liddy's evidence at Vol. 87, p. 16889.

Mr. MacPherson dealt with this matter during cross-examination of Mr. Liddy in Vol. 89, at pp. 17234-7. He referred your Commission to the British Columbia Electric case before the B.C. Board, which I intend to discuss later on another point, and he also referred to the direction in the Uniform Classification of Accounts for Telephone Companies in the United States. That is in connection with the Federal Communications Commission. The point Mr. MacPherson was attempting to make was that contributed plant or plant paid for by cash contributed by subscribers or customers should not be included in the rate base. Regulatory commissioners, in dealing with non-railway utilities have excluded from the rate base such property acquired

by donations and grants, but I submit that such cases ordinarily involve advances made by customers or property paid for by customers. There is no analogy between such contributions and property earned by Canadian Pacific under its contracts. There is an analogy in railway utilities for such things as sidings supplied by industrial firms but such property (that is the siding property in those cases) is not owned by the railway and does not form part of its investment account.

I don't want to be misunderstood there. There are certain sidings which we do own, but there are other sidings that we do not own, and it is those sidings which we do not own that supply the analogy with property donated or contributed by, for instance, a telephone company or a public utility. I, for instance, have signed a contract for the supply of electricity to my house, and I have to pay up \$10. They keep \$10 of my money so that I will pay their bills. The bills are generally small, two or three dollars, and they have no security really, so they take \$10 of my money and they go ahead and provide property with it, and it is not reflected in their investment account. Naturally it should not be, because it is my money. When I go out, I get my \$10 back, and the next fellow pays \$10. But it is very different to the position of the Canadian Pacific which earned these moneys.

My submission is that the principle which was followed in non-railway utilities cases is in no way applicable to the Canadian Pacific. The donations and grants received by the Canadian Pacific arose out of contract under which the Company obligated itself to perform certain undertakings which, on the conditions imposed on the Company being satisfied, the donations and grants became the exclusive property of the Company. This was made clear in

Mr. Walker's evidence, (Vol. 64, p. 13366) in dealing with the Company's original contract.

While there is no railroad in the United States that may be said to be strictly comparable with Canadian Pacific in the matter of obligations assumed under its original contract, there is some ground for comparison. How donations and grants are treated in arriving at the rate base of American railroads therefore is what is of interest here. It has been well established for many years in calculating the rate base for railroad utilities in the United States, to include property derived through donations and grants.

I must say, that is an accounting heading, donations and grants, and it may be it does not reflect the true legal position. I say it does not reflect the true legal position, but it is a convenient way to refer to it, and it is referred to under that heading by accountants and so I have adopted it.

This principle has been adopted by State Commissions and also by the Interstate Commerce Commission, and I would refer to Vol. 75 Interstate Commerce Commission Reports covering the period July 8, 1918, to July 8, 1923, which contains a series of valuations for rate base of quite a number of American roads.

THE CHAIRMAN: Are those values made or found?

MR. SINCLAIR: Those are values made again, and I will say why that is so in the United States. They follow^{ed} a very complicated procedure up until Ex Parte 166 in 1946, when they departed from the principle that they had been following; and in the last two cases Ex Parte 166 and 168 they have turned to original cost or historical cost or book cost, which are on a rather different basis than what we are suggesting. But I intend to

discuss that just in a moment.

In these valuation reports in the United States in each case you will find that the matter of donations and grants is dealt with and the property arising therefrom is reflected in the rate base found by the Commission.

THE CHAIRMAN: What do you mean, "reflected in the rate base", is it there or is it not?

MR. SINCLAIR: Well, you see, my lord, it all depends on what kind of property you are dealing with. In the United States for lands and rights they use present values exclusively. For other assets, up until 1946, they used an average between reproduction cost and actual cost. But since 1946 they have discarded that averaging principle and they are now going on the basis of the original cost basis or the investment base.

THE CHAIRMAN: Well, they throw donations and grants in with the others?

MR. SINCLAIR: Yes, except that they are still retaining the present value, they take present value of lands and rights.

THE CHAIRMAN: Of what?

MR. SINCLAIR: Of lands and rights. Rights mean the franchises, easements, licences which they capitalize at present value.

COMMISSIONER ANGUS: Mr. Sinclair, if they are averaging a number of railways for the purpose of fixing the same rates for all of them, the same freight rates for all of them, wouldn't they for that reason alone practically have to follow this method?

MR. SINCLAIR: Well, I don't see why. For instance, one railway may have a lot of donations and grants and another may not have quite so many.

COMMISSIONER ANGUS: That is what I say. They have to follow between the two railways.

MR. SINCLAIR: Well, the valuations are based on the property that is used in the transportation service. Take the case of, we will say, the Southern, or the Union Pacific may be better. They had a certain amount of donations and grants made to them. Now, that is in one group. When we come up to the Pocahontas group, the question of donations and grants is not an important factor, but still they give effect to - -

COMMISSIONER ANGUS: Put it this way. If you had a single railway.

MR. SINCLAIR: Yes.

COMMISSIONER ANGUS: It would not matter very much whether you interpret donations and grants as being in effect this -- you are going to invest your own money.

MR. SINCLAIR: Yes.

COMMISSIONER ANGUS: But you wouldn't say "We want a return of X percent, and in order to enable you to get X percent on your investment of our own money we give these donations and grants." That makes X percent rather high. All you can say is that we give you these donations and grants and then on the whole investment, including those, you will expect to earn X minus Y percent, something a little lower. It wouldn't matter very much which you took, but if you take a number of railways, some of which have had donations and grants and others have not - -

MR. SINCLAIR: What you are putting to me, as I understand it, is that if you do not include donations and grants in the rate base, you have to give

a higher rate of return on the base that is found than you would give if the donations and grants were in the base?

COMMISSIONER ANGUS: Yes, with a single railway you can use that type of corrective, but if you are dealing with several railways, some of which have had donations and grants and some not, you cannot use it.

MR. SINCLAIR: That may be true.

COMMISSIONER ANGUS: And for that reason, the Americans dealing with a number of railways, would have to put donations and grants in.

MR. SINCLAIR: I think that is logical, Dr. Angus, but I don't know if that is their thinking or not. I say their thinking is based on this, that they were going to give a return on the value of property in transportation service irrespective of how it arose. I think that is rightly the basis of the thinking, although I can see the logic of the position that you put to me.

THE CHAIRMAN: In any case, you say that in the case of the Canadian Pacific there was no land donated: your land was earned?

MR. SINCLAIR: No, the word is "grant" and I use the words "donations and grants", I use them in their legal significance as the widest sort of conveyance that can possibly be given. I say that "donations and grants" is an accounting connotation. That doesn't mean donations in the sense of giving but based on statute.

THE CHAIRMAN: You say donations and grants given to the Canadian Pacific, earned out of contract, that you earned?

MR. SINCLAIR: Quite so. They were not given to us; they were earned.

THE CHAIRMAN: In the same position as if you had

bought them?

MR. SINCLAIR: Quite so.

THE CHAIRMAN: That is what you say?

MR. SINCLAIR: Yes, my lord.

For example, referring to the situation in the United States, in the Texas Midland Railroad, which is the first railroad dealt with in the report, at p. 62, ~~that~~ ^{what} is of 75 I.C.C., the Report states that -- "of the total original cost of the carrier lands, approximately 40% was donated by citizens of various communities along the line". The report goes on to state that the problem of "present value" of these lands is a difficult one, but I submit that it is clear the the rate base has included property secured through aids, gifts, grants and donations and that the inclusion of such property has been the procedure invariably followed by the Interstate Commerce Commission. This position is also made clear in Dr. Locklin's book at p. 839 where he states:-

"Land donated to railroads for rights of way has entered into present valuations and rates bases in the same manner as if it has been purchased. Funds originally donated to railroads for construction purposes have been converted into physical property which enters into the rate base."

I submit that it would be manifestly unfair and contrary to the terms of the agreements under which the property was earned if in determining the rate base of Canadian Pacific property arising from donations and grants were to be excluded. It would be introducing a principle into rate making which has not been followed in the only comparable cases in the United States. I will take out the word "truly" there.

THE CHAIRMAN: You too use the words "donations and grants" though.

MR. SINCLAIR: My lord, I can see that.

THE CHAIRMAN: Although you say they are not in reality donations or grants, nor are they grants, but you say they can be earned.

MR. SINCLAIR: The only reason I use that -- and I can see where it might lead me -- it is probably an improper designation of what the situation is, but accountants get hold of these phrases and they put them in their accounts, and I kind of picked them up. That is the only excuse I have for using them.

THE CHAIRMAN: You see, Dr. Locklin, by his last quotation, just talks of lands donated to railroads for rights of way, just that one thing.

MR. SINCLAIR: Yes.

THE CHAIRMAN: In that first sentence.

MR. SINCLAIR: Yes, but all the texts go on -- and the cases make it very clear -- that there is no distinction between rights of way and between lands or cash or other assets. I think maybe these texts have also fallen to the same position as I have. It is a matter of convenience they have picked up the phrase "donations and grants", even though in the United States some of these rights earned --

THE CHAIRMAN: I really would like to know whether you are admitting that in addition to what you have earned, you have received any donations or grants.

MR. SINCLAIR: I don't know of any case, any property, any cash, we gave consideration for.

THE CHAIRMAN: Is there any law that there may be about donations and grants that would not apply to the Canadian Pacific, is that so?

MR. SINCLAIR: Well, if you are going to give the phrase "donations and grants" its literal meaning, I say it has not got this literal meaning. It is an accounting connotation, and it does not mean donations in the sense of a gift or a grant in the sense of a present. It means what you have received under contract or what you have received under Statute.

COMMISSIONER INNIS: But politically it would mean grants and donations?

MR. SINCLAIR: Well, I can see that.

THE CHAIRMAN: As you say in your last sentence: "It is, however, a matter that must be dealt with by the Board".

MR. SINCLAIR: If it is raised by the provinces, that is a pious hope that my friends from the provinces will see the force of this argument and not waste time on that any more.

This, however, is a matter that must be dealt with by the Board if it is raised by the Provinces.

On the matter of understatement of property investment through following renewal accounting, I do not think anyone would challenge the statement that the difference in cost between the original asset which was capitalized and the cost when it was replaced in kind, is not capitalized under renewal accounting procedures, and the result must be to have the asset in service represented in the books of the Company by a much lower amount than the asset actually cost. Mr. Liddy's evidence on this matter will be found in Vol. 85, pp. 16634-36.

Canadian Pacific submits that its book investment is unquestionably a minimum rate base and many hundreds of millions below a replacement cost rate base.

I think it would be quite proper to say that there is likely a difference of some 800 million or more.

THE CHAIRMAN: So that it would be about 2 billion instead of one?

MR. SINCLAIR: Around, in rough figures, something below two billion. That is why I find it rather difficult to understand some of the arguments put forward by some of the Provinces in the 20% Case, when, if I read them correctly, they took the position that there would have to be a physical evaluation.

Undoubtedly the replacement method of arriving at a rate base has some merit (and this is the point Dr. Innis put to me). Many economists believe that it is the fairest method of dealing with the matter. For example, Professor McDougall, in Vol. 94, p. 17840, stated:-

"In economic terms I think that the genuine investment in an enterprise is the total cost of reproducing the property in equally useful shape, less observed depreciation."

Professor McDougall went on to acknowledge the practical difficulties in using the reproduction method. However, he stated:-

"The historical cost method of establishing a rate base does not, in my opinion, provide anything like an adequate rate base for the Canadian Pacific, unless the rate of return is proportionately adjusted to the realities of the case."

The replacement cost method was very much in the forefront in the United States from 1898 until 1942. The reason for this, I submit, was because of a series of decisions of the Supreme Court of the United States on rate cases on regulated public utilities.

THE CHAIRMAN: Pardon me, you say "on rate cases". Is that right, a series of decisions?

MR. SINCLAIR: "On rate cases", "concerning".

THE CHAIRMAN: They are rate cases?

MR. SINCLAIR: Yes, "in rate cases on", it should be -- "Supreme Court of the United States in rate cases on" or "concerning", I don't care, "regulated public utilities" . In 1898 the famous case of Smyth vs. Ames, 169 U.S. 466, was decided. The Supreme Court in that case made it clear that in arriving at the fair value of a regulated utility, regard must be had to original cost, including additions and betterments, and also replacement cost or cost of reproduction. In addition the Supreme Court in the United States put down a number of other factors that they said had to be given effect to, but after a great deal of discussion and trying to fit the facts into the theory, that was put out in the Supreme Court decision; they found that some of these tests or factors were unrealistic; and down through the years in all this experience in the United States, of the various tests that were set forth in Smyth v. Ames, only two remain, reproduction cost or original cost.

Arising from that case, for over forty years it was believed in the United States that in fixing a rate base without taking into account replacement cost would be a contravention of the constitutional guarantees in the American constitution which prevent private property being taken without due compensation. It was not until 1942 when the Supreme Court decided the case of Federal Power Commission v. Natural Gas Pipe Line Company, 315 U.S. 575, that the principle was enunciated that a regulatory commission was free to adopt whatever formula or combination of formulae

they chose in arriving at a rate base, and their findings would not be gone into unless it was clear that the rate base and return allowed on that rate base did in fact amount to a wrongful taking of property without compensation. That determination of reproduction cost was not an essential element in fixing a rate base was put beyond doubt two years later in the case of Federal Commission v. Hope Natural Gas (1944) 320 U.S. 591, 51 P.U.R. (N.S.) 193. The decision of the Federal Power Commission in the Hope case is reported in (1942) 44 P.U.R. (N.S.), page 1. At page 14 of this report I find the following:-

"With the decline in favour of the doctrine of 'fair value' as the only mod of public utility rate regulation, its keystone, reproduction cost, crumbles. Bona fide investment figures now become all important in the regulation of rates."

I think that is an important statement.

Two of the most important cases are the Hope Natural Gas case (1942) 44 P.U.R. (N.S.) 1; on appeal to the Supreme Court of the United States (1944) 320 U.S. 591; 51 P.U.R. (N.S.) 193; and British Columbia Electric case (1943) 53 P.U.R. (N.S.) 438. Mr. MacPherson in his argument (Vol. 120, pp. 21644-5) referred to both of these cases. Mr. MacPherson attempted to leave the impression, (if I understand him correctly), I submit, that in each of these two cases the regulatory commission did not accept for a rate base book investment figures. I submit that this is clearly wrong. In the Hope case the Federal Power Commission at page 9 of 44 P.U.R. (N.S.) referring to reproduction cost studies and trended original cost studies, which were in evidence, said: "the results have no probative value and accordingly must be condemned"

and further "the estimate of reproduction cost and trended original cost lack reliability so we turn to the evidence of actual cost of Hope's property". The Commission in the Hope case did deduct from the book investment figure something over a million dollars, in arriving at the rate base, but the reasons for so doing are clearly set out in the report. The point is that the Commission did accept book investment figures with slight adjustment and waived aside the determination of reproduction cost.

In the British Columbia "Electric Case that Company
1943
as is shown at page 451 of the report, (53 P.U.R. (N.S.)) - -

THE CHAIRMAN: What is "P.U.R."?

MR. SINCLAIR: Public Utility Reports. It is an American group of reports, but they also report Canadian cases of interest, '

In the British Columbia Electric case that Company,
1943
as is shown at page 451 of the report, (53 P.U.R. (N.S.))
contended it was necessary that reproduction cost should be a factor in estimating of value. The British Columbia Commission did not accept this and stated at page 451, referring to the Company's contention which was based on American decisions: "To be influenced by past practices which are now likely to be abandoned would be a great mistake. The decision was some six months before the United States Supreme Court decision in the Hope case and how right the British Columbia Commission's decision was is shown in the final decision in the Hope case. The crux of the British Columbia decision on this point will be found at page 449, where it is stated:-

"After giving full consideration to other measures of value such as reproduction cost and exchange value, we have come to the conclusion that historical cost, that is to say, cost of the present utility when prudently

invested, less depreciation, is the fairest measure of value which can be used in this appraisal."

I think it is worthy of note that the Board of Transport Commissioners in Ottawa v. Ottawa Electric Railway Company (1946) 59 C.R.T.C. 136, also used book figures, although in that case the rate base was on gross investment rather than investment less depreciation.

THE CHAIRMAN: Pardon me a moment, are you saying shortly that what you have just quoted from the Hope case, is the method which the Board should follow?

MR. SINCLAIR: That is from the British Columbia case, yes, I am saying that.

THE CHAIRMAN: If your amendment is adopted.

MR. SINCLAIR: Yes. I will deal later with this contention of Mr. Smith and Mr. MacPherson about prudence of investment, and also with Mr. Smith's statement about there is no provision in our amendment for deducting depreciation.

In determining rate base for American railways, reproduction cost was always given great weight until 1946, when its difficulties were clearly recognized by the Interstate Commerce Commission and rate base evaluation was arrived at on original cost. In Ex Parte 166, 270 I.C.C. 403, at 436, the Commission stated:-

"We have considered the data submitted by the Bureau as to the estimated costs of reproduction new and less depreciation. The amounts appear upon page 47 of our original report. In our judgment the fact that cost of reproduction new upon the basis of recent price levels for materials and construction

far exceeds the investment of the petitioners as claimed by them, shows the strong effects of inflationary forces and warrants us in accepting as the basis for compensation of the aggregate value of the properties in carrier service, the best evidence we have as to original cost and depreciation upon the basis of the accruals by the petitioners, together with present value of lands".

Now, there are two points there, and you will note that the Interstate Commerce Commission referred to:- "the best evidence we have as to original cost and depreciation upon the basis of the accruals". Now, the latest case of the Interstate Commerce Commission is Ex Parte 168.

THE CHAIRMAN: Pardon me, what was the year of this Ex Parte 166?

Page 23531 follows

MR. SINCLAIR 1949 was Ex Parte 168. I shall look it up, my lord. Mr. Evans suggests it was later than that.

The latest case of the Interstate Commerce Commission is Ex Parte No. 168, 276, I.C.C. 9, which was decided on August 2, 1949.

It was in 1948 I am advised, my lord; it was Ex Parte 166, 1948, and Ex Parte 168 is 1949.

At page 18 of the report the rate base is dealt with. In finding the figure for rate-making purposes the Commission said:

"This is based upon the original cost, except lands and rights, plus the present value of lands and rights, and an estimated normal amount of working capital including materials and supplies, less the recorded accrued depreciation."

The reason why I emphasize those matters is that the basis upon which the Interstate Commerce Commission found rate base differed in Ex Parte 162, Ex Parte 166 and Ex Parte 168, and I shall try to deal with them a little further on.

It is recognized that the Interstate Commerce Commission has a problem with the book investment figures of American railways since they are disjoined and unreliable. This fact is noted in many texts; for example, Bauer and Gold --

THE CHAIRMAN: That is not in your notes here.

MR. SINCLAIR: No, my lord. That is a book that was referred to by Mr. Smith, and I looked it up. It is called "Public Utility Valuation." It is rather an old book for this subject, but I use it because he used it. It was published in 1934. At page 119 I find

this:

" . . . the commission found that it could not find the actual cost of the properties for lack of adequate records."

Now, that is referring to the American lines, and I lay considerable stress on that because of the fact that Mr. MacPherson in dealing with it on his argument on rate base-rate of return kept on referring to the Puget Sound case as if that was applicable in Canada. But there is the difficulty they have in the United States; the roads have not got the records.

The difficulty with American railway book investment figures has been referred to on a number of occasions and Mr. MacPherson in his argument (Vol. 120, p. 21647) quoted from the Interstate Commerce Commission's decision in Ex Parte 162, 266 I.C.C. 723. That is where they refer to the Puget Sound case. The point I wish to make is that undoubtedly book investment figures are a difficulty in the United States in arriving at a rate base but we have not that difficulty here in Canada in connection with the Canadian Pacific

The Canadian Pacific is fortunate in having records which will enable the Board of Transport Commissioners to use historical records in ascertaining actual cost, with the single qualification I spoke of earlier arising from following the practice of replacement accounting. That is on road property and power and plant machinery. This was made clear during Mr. Covert's examination of Mr. Liddy (Vol. 90, pp. 17328-9).

I would like to say here that Mr. MacPherson during his argument (Vol. 120, pp. 21652-4) put forward the view that while he conceded the advantages of the rate base - rate of return technique, he said this was impractical in Canada because of two things:

Now, you will recall that I made a reference earlier in my argument to the fact that he said sooner or later in fairness to everybody we have to have it. Now, in his argument he says that it is the best, that it has practical disadvantages, and he gave your lordship and the Commission two. The two things that he said were preventing him from going forward and supporting the Canadian Pacific I presume in getting an equitable adjudication of a general level of rates, were:

first - that we do not have uniform accounting;
and

secondly - that the Board did not have the proper experts.

I submit that uniform accounting is not a prerequisite of having a rate base established on book investment of Canadian Pacific.

The question must be, do the present books enable a rate base determination? The evidence is that they unquestionably do. That is not in my notes, but these notes were prepared under a considerable amount of pressure, my lord, and from time to time --

THE CHAIRMAN: What do you say the principal question is?

MR. SINCLAIR: The question must be, do the present books enable a rate base determination? The evidence here is that they unquestionably do, in regard to Canadian Pacific.

Uniform accounting is only an advantage where the regulated utility's records are not complete or not reliable.

Now, nobody has suggested that our records are not complete; the evidence is that they are complete. Nobody has suggested that they are not reliable, and I say they are reliable.

1974

As I have said, that is not a problem with Canadian Pacific figures. So much for that difficulty.

As to the experts on the Board's staff, Exhibit No. 279, filed by Mr. Frawley, shows that the Board has on its staff today statisticians and accountants and transport economists. But I do not need to rest there. If, in the Board's view, additional assistance is required from experts of any type, accountants, economists or statisticians, the Railway Act by Section 21 and by Section 69(1) makes it possible for the Board to secure special technical assistance for the job that they would be required to do.

I submit that the reasons given by Mr. MacPherson for not having rates fixed on the rate base-rate of return technique, if not purely specious are certainly of little weight.

There are many practical reasons for accepting historical or book cost in preference to reproduction cost for rate base purposes but, in considering a utility the size of the Canadian Pacific, I think the most cogent reasons why historical cost should be the rate base are: (1) it enables the rate base to be determined readily; (2) the rate base can be easily kept up to date; (3) it avoids the necessity of a new evaluation every time a rate case is determined.

The Canadian Pacific has the historical records and by accurate accounting can maintain those records in a manner which would make available at all times an up to date record of the investment in railway property. The ascertainment of the historical cost of railway property and the maintenance of such a record would be a relatively simple task and one that would not be unduly expensive. A physical valuation of the rail property assets of

Canadian Pacific, on the other hand, would be a tremendous and costly task. That this would be so I do not think requires much argument, when one considers the extent of the property and its widespread geographical setting. Some idea of the cost involved in physical valuation of railroad properties can be secured from the United States.

By the Valuation Act of 1913 the Interstate Commerce Commission were required to find the reproduction cost of American Class 1 Railroads. They were also required to find the original cost at 1914 by that Act. Between 1914 and 1932, to get the basic value of the Railroads as of 1914 and adjust that figure with additions and betterments to the cost of 1932, necessitated a Government expenditure of over \$40,000,000 and an expenditure by the Railroads of about \$138,000,000 - (Hearing before Committee on Interstate and Foreign Commerce, 1932, H.R. 7116-7). Between 1932 and 1946 the checking and maintaining of reproduction cost records resulted in the expenditure of many more millions. The estimate generally accepted is that the cost to the Government and the Railroads since 1914 has been in excess of \$200,000,000. I very much doubt whether my friends from the Provinces or any regulatory tribunal would, in the face of these tremendous expenditures and undoubted delays, support the determination of a rate base on the reproduction cost method.

Now, referring to the situation as applied to United States railroads, Bauer and Gold, the book I referred to earlier, "Public Utility Regulations", at

page 121 says:

"Its costs were far beyond original expectations, while its future usefulness now seems particularly uncertain."

Now, that was written in 1934. By 1948 the Interstate Commerce Commission had thrown away any reliance on the reproduction cost figures that these many millions were spent to secure.

In determining whether to adopt actual cost or reproduction cost, it is important to weigh the advantages of each and to put into effect that basis which will best serve the interests of investors, shippers and the general public. Dr. Locklin in his "Economics of Transportation" and Dr. Bigham in "Transportation Principles and Problems" both consider the advantages and disadvantages of actual cost and reproduction cost as methods of arriving at the rate base. Their conclusions are worthy of note. Dr. Locklin at p. 383 says:

"Our discussion of the controversy between actual cost and cost of reproduction as a rate base makes it clear that there are difficulties with either base. As between the two rival bases of valuation, the author believes that actual cost or prudent investment is preferable from an economic point of view. Some modification should be made, however, to compensate stockholders for changes in the value of money on that part of the property represented by the stockholders' equity.

This result might be worked out by giving some weight to cost of reproduction, but the simpler way is to make variations in the rate of return to be allowed."

Dr. Bigham at p. 264, states:

" We conclude that the best basis for rates is the prudent investment. Though not a perfect standard, the original cost has much more to commend it than the cost of reproduction."

I ask you to note how these authors use the words "prudent investment, "original cost" or "historical cost" as synonymous, and I think that your lordship put to Mr. Smith --

THE CHAIRMAN: Are you sure of that?

MR. SINCLAIR: Yes. I think your lordship put to Mr. Smith that it would become axiomatic, and I think that is true, that prudence on the investment would be axiomatic in determining the investment upon which a return would be granted by a regulatory commission.

At p. 265 Dr. Bigham has a passage which I think is very much in point. He says:

"In our opinion, the proposals to regulate rates without reference to the valuation of the property are at fault in principle, to say nothing of the constitutional difficulties that might be encountered."

He puts it on the basis of principle, irrespective of any constitutional difficulty.

"One is inevitably led to the conclusion that a valuation of the property is necessary, for the restriction of profits requires a measure of their reasonableness. A rational measure is the original cost."

THE CHAIRMAN: Just a minute. He says, "The proposals to regulate rates without reference to the valuation of the property . . ."

MR. SINCLAIR: Yes, he uses valuation.

THE CHAIRMAN: Does he not simply mean there, without reference to the original cost?

MR. SINCLAIR: Yes, but he uses valuation in that particular connotation that is picked up in relation to rate base-rate of return. It does not mean a physical valuation.

THE CHAIRMAN: Well, he says, "One is inevitably led to the conclusion that a valuation of the property is necessary."

MR. SINCLAIR: Yes.

THE CHAIRMAN: "For the restriction of traffic requires a measure of their reasonableness. A rational measure is the original cost." He seems to me to use all those terms in a rather queer way.

MR. SINCLAIR: Well, my lord, I say that what he means there is that if you are going to make a value for rate-making purposes the best value is the original cost.

THE CHAIRMAN: Yes; that is the making of a value instead of the finding of one.

MR. SINCLAIR: That is right. That is all he is saying. He says, "A rational measure is the original cost," and he says as a matter of principle if you are going to restrict profits you should see that there is a rate of return on the value of the property, that is, the original cost of the property.

I submit that in Canada the only practical and acceptable base is book investment of Canadian Pacific and would ask your Commission to recommend that basis be adopted.

Now I am constrained to say that every time investment in rail property has been mentioned in the presence of my friends from the Provinces, they seem to

find some difficulty in our use of the suggestion that the rate base can be taken as the book investment. They spent considerable time in trying to distinguish book investment from what they term prudent investment. Now I submit to you that it is clear that the only investment that any regulatory tribunal would take into account in fixing a rate base on actual cost would be an investment that excluded moneys recklessly or dishonestly spent. Fraudulent or extravagant expenditures should not be a burden upon the public. To make that point does not require argument, but it does require proof that there are such fraudulent or reckless expenditures in the book investment figures. At the same time, however, it must be made abundantly clear that no regulatory tribunal should or does require unusual foresight on the part of management.

I do not think my friends from the provinces, Mr. Smith or Mr. MacPherson or any of them, would try to be so unfair as to put a test on the Canadian Pacific of sitting in an armchair after the event and saying, in that air of calm, "You made a mistake by building a piece of line around Winnipeg or some other place, you should have gone right through the city."

Dr. Bigham puts it in this way at p. 246:

"Unusual foresight on the part of management should not be demanded but if the expenditures are clearly fraudulent or improvident, the burden should rest upon the investors, not the public."

The matter of the so-called prudent investment was also considered by the British Columbia Commission in the British Columbia Electric case, 53 P.U.R. (N.S.) 438, where the following will be found at 453:

"It is only reasonable to assume that the capacity and design of plants acquired in operating condition were dictated by the best engineering and financial knowledge of the day. The words 'prudent' and 'reasonable' must apply to the price paid. Unless there is evidence to show that the price was determined by some consideration not consistent with public interest it must be accepted as prudent."

I submit that the proposed amendment that we have suggested your Commission should recommend would adequately protect the public, by leaving the Board free, in finding the investment in rail property of Canadian Pacific, to take into consideration all relevant factors and that the prudence of the investment is not a matter for statutory treatment but is a matter that should be left to the discretion of the Board on the facts and material before it in any given instance.

COMMISSIONER INNIS: Do you think an extraordinarily successful investment might create difficulties, or would you call that prudent?

MR. SINCLAIR: Well, I think the test of prudence, Dr. Innis, is, was it made in good faith at the time it was made? Now, when you say --

COMMISSIONER INNIS: Well, I am thinking of an investment in which you might have made an enormous amount of money, which had poured back funds and which would be presumably included in the investment figures.

MR. SINCLAIR: Well, that is rather hard for me to visualize as an investment in rail property, in view of the situation as it existed --

COMMISSIONER INNIS: I was thinking perhaps of Smelters.

MR. SINCLAIR: Of course, that is not rail investment.

COMMISSIONER INNIS: You exclude all that?

MR. SINCLAIR: Well, I think only Saskatchewan has come forward with the idea that Smelters should be part of rail investment. I think Mr. Frawley said no, and I think Mr. Shepard said no. There was some dispute as to a number of items like Toronto Terminals and a few things like that, but if they were to be taken in I think everybody agreed that the investment would go in and they should earn a return on them. But when you say --

COMMISSIONER INNIS: There is no such thing in your opinion as investing so profitably that it seems extravagant?

MR. SINCLAIR: Well, Dr. Innis, Canadian Pacific has been regulated since its inception as to the profit it could make. For instance, for a long time it was 10 per cent. It never made it. Ever since 1903 its profits have been strictly controlled by the Board, and I do not think there is anybody here who is going to suggest that our profits should not be controlled -- I have not heard them, anyhow -- and so I do not think that we need to worry too much about that. I think it is much more of a worry for all of us to see that we do get an adequate return on the investment to protect the capital that is already in the company and to attract additional capital to make the enterprise more efficient.

Recess

MR. SINCLAIR: Just before we adjourned Dr. Innis mentioned a very favourable investment, and a thought occurred to me during the adjournment, that if that was a fear we would be in the position very similar to the position of where we would be in a circle again, where the rates were going to fix the value and the value was going to fix the rates; and so I think that on that ground as well as on the ground I put before the adjournment, it is a matter that need not give us concern or give the Commission concern.

COMMISSIONER INNIS: I was wondering about one item which Mr. MacPherson mentioned, that is to say, the premiums on stock.

MR. SINCLAIR: Well, when we take the early history of the Canadian Pacific, I think that we have to look at it in its proper perspective. We required money, otherwise it would not be available. Now, these premiums that were paid on ordinary stock arose because the company was able to have some successful years and to return some of that to their investors. I think that if you look over the whole history of the return it has not been anywhere near adequate, and I do not think that you can pick out just two or three years. I think Dr. Dorau's approach was likely --

COMMISSIONER INNIS: I would not think that, but somebody else might.

MR. SINCLAIR: Well, I think that we can meet it, Dr. Innis. I think that Dr. Dorau's approach was essentially sound. He took the historical cost of the money as being the best gauge for the rate of return, and you will recollect that we made some reference to that during the proceedings, and he found that the historical cost of the money was, I think, 6.52; that was the

historical cost, and then he related that to the present value, and then he came up to his 8.2. Now, of course, there is this further point, Dr. Innis, that the premium on the stock is money that we have taken and actually invested in the rail investment or in the corporate investment. If it is on the rail investment that is what we would be asking a return on. So it is all money that has been reflected in the facilities that are available for public use.

THE CHAIRMAN: I notice on page 19 -- I did not notice it when we went over it, but my attention has been called to it -- after quoting Dr. Bigham you say:

"I submit that in Canada the only practical and acceptable base is book investment of Canadian Pacific and would ask your Commission to recommend that basis be adopted."

Do you mean recommend by legislation?

MR. SINCLAIR: Well, the way I look upon this --

THE CHAIRMAN: You see, every time we have been asked to make these vague recommendations we pointed out, if we recommended anything to be useful we should recommend it by amendments to the --

MR. SINCLAIR: Quite so, but when you look at our amendment, our proposed amendment 325(7), we say, " . . . and the Board may from time to time determine the investment in railway property." Now, I would expect, my lord, that when you are writing your report and you are dealing with this segment of it, you would have to deal with it on a basis as to what you felt should be the method of determining that investment, and I would say that you would recommend --

THE CHAIRMAN: What part of your proposed amendment?

MR. SINCLAIR:, In the consolidation it is at page 20, our consolidation of the Railway Act, or at page 5 of my notes, whichever is the most handy.

THE CHAIRMAN: What is it at page 5? What do you call my attention to?

MR. SINCLAIR: The wording of the amendment -- " . . . and the Board may from time to time" --

THE CHAIRMAN: Well, you see, I asked you when you were there whether you did not anticipate possible trouble before the Board, and if so whether you had provided yourselves with any legal remedy; you remember I asked you that this morning?

MR. SINCLAIR: Yes, quite so, my lord.

THE CHAIRMAN: Well, is that your only answer to it, that you would ask us to make certain recommendations?

MR. SINCLAIR: Well, our case would be based on book investment. We say it is the logical base in view of all the circumstances.

THE CHAIRMAN: Yes, but you are not asking us to put that in the Act.

MR. SINCLAIR: No, my lord; I do not think that it is necessary to do so.

THE CHAIRMAN: Well, don't you think, here is a Board which would have this thing before it all the time, with its experts of all sorts; what benefit would it be to them to have us recommend that they follow a certain procedure, when they are free to follow any procedure they seem best advised to follow?

MR. SINCLAIR: Well, my answer to that would be that there is your tremendous experience, my lord, and then your colleagues in their position in the economic world I am sure would carry tremendous weight with the --

THE CHAIRMAN: I never ran a railroad.

MR. SINCLAIR: No, but it is not only a railroad problem, it is an economic one.

THE CHAIRMAN: I do not really think that these recommendations by us to the Board as to what they should do are really of very much moment. I just want to put this to you: You are not asking us to put that in the Act?

MR. SINCLAIR: Not in the Act, but I suggest and I urge you in dealing with this portion of your report that you kill -- and I say once and for all, and I think that is what it will be -- a physical evaluation of the Canadian Pacific, and that you give support by your report to the book investment base as being the base for the fixing of rates for the Canadian Pacific.

THE CHAIRMAN: I see; all right.

COMMISSIONER INNIS: Your faith in us almost surpasses that of the Provinces.

MR. SINCLAIR: Well, I am quite prepared, Dr. Innis, to have your support, and I welcome it and I urge it.

I was dealing with the paragraph in regard to prudence of investment, and I say that that is not a matter for statutory treatment.

Now, you will remember Mr. Smith during his argument, in Volume 125, at page 22554, said, "Why, there is nothing in this amendment to provide for deduction of depreciation, there is nothing in this amendment to provide for prudence of investment," and he said if your Commission is going to recommend the adoption of such an amendment both of these things should be taken care of. Now, your lordship pointed out to him that it was practically axiomatic, and he agreed with you, but in spite of that he felt that it should be in the Act. I say that it is not necessary and that we should keep these sections

of the Railway Act as general as we can, so that the Board will not be circumscribed by unnecessary language that is bound to cause difficulty and argument and much delay in having these very important matters decided. Certainly the Board will deduct depreciation from the rate base, and the provinces are indeed fortunate in having the Canadian Pacific as a rate base that would have accruals to the extent that we have. As I said earlier, we are unique in that regard, and in that we are able to get a minimum base, the lowest conceivable base. They certainly would deduct depreciation, and they certainly would take into account prudence, and those are not elements that need to be delineated in a statute.

The next point I wish to discuss is the matter of rate of return.

Here again, Canadian Pacific is not asking your Commission to fix a rate of return on the specific investment in rail property of Canadian Pacific Railway Company. However, there are a number of principles that I submit should receive your consideration and which I urge should be adopted by your Commission in dealing with this subject.

One of the essential points is that the rate of return adopted as fair must be at such a level as to yield the necessary returns on the various classes of securities ranging from secured bonds to common stock. This principle, I submit, is of great importance. We have practically had unanimity in these proceedings in the fact that Canadian Pacific should continue to be a privately owned enterprise and should receive adequate earnings. Canadian Pacific is not in a healthy financial condition unless it is able to attract equity capital. A rate of return based on the interest rate borne by

senior bonds would not meet this need for Canadian Pacific. The rate of return on investment for the Canadian Pacific, to enable it to attract capital, must be substantially higher than the rate payable on its senior securities, so that the effective return on its equity capital, in normal times, is more generous. Such equity capital needs the higher permissible rate because of the risks of the shareholders who, in bad times may, quite apart from the policies of the regulatory body, have to accept a reduced dividend.

By fixing a rate of return on the rail investment of Canadian Pacific, this would not amount in any sense to a guarantee to the investors in Canadian Pacific. Professor McDougall made this clear at Volume 94, p. 17847:

"Q. What would you say if conditions should make it impossible for the railway to earn such a rate of return? (referring to the 8.2% deemed necessary by Dr. Dorau in his evidence in the 20% Case and 6-2/3% being the figure deemed necessary by Mr. Northey Jones in his evidence in that Case).

"A. I do not think that any regulatory tribunal sets itself up as guaranteeing a rate of return to investors in a public utility. Only economic conditions and operating efficiency can determine what actual return will be obtained. What I suggest is that a rate of return calculated as I have indicated should be regarded as permissible, and that the Company should be free to establish rates under this rate of return as a ceiling."

I wish to place particular emphasis on the evidence of Mr. Walker in Vol. 64, p. 13384, where he said:

"The Canadian Pacific makes no claim that the status of its security holders entitles them to protection against financial risks. It does assert that, having regard to the contractual obligations stipulated for by the Dominion and assumed by it, the Company has a right to such treatment from the public authorities of Canada as will afford it a free and fair opportunity of fulfilling those obligations, and of carrying on its undertaking with a reasonable expectation of profit. In no other way can its credit be maintained, as necessarily it must, if the railway is to serve adequately the constantly expanding needs of Canadian industry, in all its branches, for modern and efficient rail transportation."

Now, during Mr. Smith's argument he referred on a number of occasions to this book that was published in 1947, "Public Utility Regulation " by Herman H. Trachsel. Mr. Trachsel, who has written a number of books on this subject, in this book at page 51 at the bottom has this to say:

"Since the public utilities are rendering a public service, the state must be sure that no acts on its part will prevent the free flow of capital into these enterprises, for without adequate capital the utilities will not be in a position to perform their function properly. Any method of regulation must recognize this obligation. It is the duty of the regulatory

body to protect the consumers and investors alike."

I might at this stage refer to a matter that has come up on a number of occasions, and that is how the situation is covered in the United States. In Ex Parte 162, which was the case that was decided in 1946, and is reported in 264 I.C.C. at 727 --

THE CHAIRMAN: Pardon me, what was that?

MR. SINCLAIR: I have left my notes, my lord, and I wanted at this stage to try to meet the argument put forward by Mr. Smith in regard to the American situation, and also to answer a question that was raised by I think Dr. Innis, as to what was the return on a number of representative roads in the United States under the last decision. I have developed this material --

THE CHAIRMAN: You mentioned a decision.

MR. SINCLAIR: Yes; I am going to deal with Ex Parte 162, which is the first one, which is 1946, 264 I.C. C. at 727. I am dealing with it only in regard to rate base and rate of return.

In that case the value, the aggregate value of Class 1 roads was \$19,500,000,000-odd. The basis of the value was January 1, 1938, as they found in that case, 299 I.C.C. at page 451, adjusted for the net increase in book investment and the increase in depreciation and amortization reserves from January 1, 1938, to January 1, 1945, and the change in the normal amount provided for working capital. The basis of the value for January 1, 1938, was the average of the cost of reproduction less depreciation and original cost less depreciation except the value of lands and rights. Now, in addition they added going value, which was calculated at 2% of the value of the property. When it was all worked out it was found

to produce a return of approximately 4.51 per cent.

The next case I wish to refer to is Ex Parte 166, 269 I.C.C.

THE CHAIRMAN: That is 1948, isn't it?

MR. SINCLAIR: Yes, my lord. That is the case I referred to earlier when I said that for the first time they cast aside this reproduction cost. Up until that time they were taking an average between reproduction cost less depreciation and original cost less depreciation.

THE CHAIRMAN: Ex Parte 166, 1948, is where?

MR. SINCLAIR: 269 I.C.C., and the valuation is at page 48, the valuation part of the report.

In this case the I.C.C. gave consideration only to original cost. This amount was arrived at by taking original cost except lands and rights, deducting from it the amount of depreciation and amortization accrued in the books of Class 1 roads as of December 31, 1946, and adding the present value of lands and rights and an allowance for working capital. In this case they made no allowance for going value, which they did in the former cases; in Ex Parte 162 they gave an allowance of 2%.

In Ex Parte 168, which is the latest case, 1949, which is in 276 I.C.C. -- the valuation part of the report is at page 18 --

THE CHAIRMAN: Pardon me, did you say 276?

MR. SINCLAIR: 276 I.C.C., and the valuation part of the report commences at page 18. The basis of the figure for valuation is approximately the same as that of the value estimated in Ex Parte 166, except that in that case they arrived at working capital on a slightly different basis than they did in Ex Parte 166. The final return I think I said in Ex Parte 162 was 4.51 per cent; in Ex Parte 166 it was 5.7 per cent, and in Ex Parte 163

it was 4.03 per cent.

Now, there is this to be remembered, however, that in arriving at these returns they arrive at them in a rather unusual way. For instance, in Ex Parte 168 they had a constructive year; they said, "How much will this increase that the railways ask for earn?" And they applied the forty-hour week all the way back through the year that was being used for the base, so that you cannot actually find what the return is until you see the figures all worked out.

(Page 23551 follows)

The point I wish to make here is that these are averages, these returns that I am giving are averages; and we also must remember that there is about half of one per cent difference between Canada and the United States, which is in accordance with the evidence of Mr. Jones in the 20% Case.

I think it was Dr. Innis who asked whether some representative returns on various roads in the United States on the basis of the Ex Parte 168 decision, could be calculated, and I have had this done. You will recall that there are different regions in the United States, and I have tried to take roads from different regions. For instance, in the Central Eastern Region I have taken the Baltimore and Ohio which had a return of 4.72, and the Pennsylvania 3.06. Then in the Pocohontas Region (the aristocrats was the way they were designated by Mr. Smith, the people that carried the coal): Chesapeake and Ohio, 8.2; Norfolk and Western, 9.72.

THE CHAIRMAN: What did you say about the Pocohontas?

MR. SINCLAIR: That is the coal-carrying group, and their return is 8.2 for the C. & O. and 9.72 for the N. & W. Now, in the Southern Region, taking the Southern Railway, that is a large railway, their return was 5.66. Now, in the Northwestern Region, I will take a grain-carrying road, that is the Great Northern Railway, 5.24; in the Central Western Region, the Santa Fe, 7.18; in the Northern and Centre Region we take the Burlington, 5.38, and also the Union Pacific, 5.81. Then in the Southwestern Region, the Missouri Pacific, 5.79. Now, all those roads of course average out, the highs and the lows, to this return I was speaking of earlier, of about $4\frac{1}{2}$ per cent.

But I say that looking at the Canadian Pacific there is a different situation in Canada than there is in the

United States, and we cannot follow too closely the procedures that they have followed. We are unique in the position that we in the Canadian Pacific are competing with a government-owned road. In the United States that situation does not exist, and I think it is of the utmost importance to remember that.

The next principle I wish to stress in regard to the rate of return is that it should be such a rate as would attract capital to the enterprise. In considering what will attract capital, the test is, of course, the market price of the ordinary shares - (Professor McDougall, Vol. 94, p. 17846.)

Professor McDougall expressed the view at page 17845, Vol. 94, that if depreciated book value or a historical cost base is followed, there should be an increase in the rate of return applied to such a base in order to establish an economic rate of return on the property actually devoted to the public use.

I wish to emphasize that there must be a reasonable relationship between the equity capital and the fixed interest debt capital which make up the capital structure of the Company. If fixed interest capital such as bonds is resorted to, the result will be as was stated by Professor McDougall, in Vol. 94, page 17833: "you cannot continually increase your debt without coming very close to the point where people reject the debt also".

I want to make it clear again that we are not asking for, nor would we contend that we would have any guarantee, that our common or ordinary stockholders would be protected from the risk that they must take as that class of security holders.

Now, Dr. Angus, I think, earlier put to me three

examples and I thought that I had covered it more fully than I apparently have. He put the situation to me that the rate of return is in some way different in its effects when applied to one of the railways as a yardstick. Now, the way I see this, and my answer to it would be this: We have today a requirements base. We are asking this Commission to recommend that we leave it aside and go to the rate base-rate of return technique. Now, there is no distinction in my submission today in using requirements, because we may have very small requirements.

THE CHAIRMAN: No distinction between what?

MR. SINCLAIR: Well, there is only one railway today taken for a yardstick under the requirements, and one railway being taken as the minimum base for fixing rates on a rate base-rate of return technique. Dr. Angus seemed to think -- I don't want to misinterpret him -- he put to me, what would be the difference, or would I think there should be any distinction.

COMMISSIONER ANGUS: I didn't mean a difference between requirements and rate of return, but I meant that either of them would leave no room for incentive, that you get the same income whether you are making a little extra profit on something or not. I mean, you are working as a regulated, closely regulated, public utility, not really as a free enterprise in the full sense of the word. Now, it seemed to me that there is a difference between those two things, and I am not quite sure which the Canadian Pacific wants to be. I thought Mr. Evans was stressing free enterprise, and yet at times I think you are stressing this rigid definition of aggregate earnings.

MR. SINCLAIR: Well, Dr. Angus, could I put it this way. I don't think that there is any public utility of the size of Canadian Pacific, at least as far as

thinking of the populace has gone up to date, able to be locked upon as a purely private enterprise utility. But that is not to say that there is not a great distinction between the Canadian Pacific as it is today, regulated as to the amount of profit that it may make, and the Canadian Pacific being owned by the government.

Now, when Mr. Evans talks about the Canadian Pacific as a free enterprise, he, I know, is not suggesting that there would not be some regulation of our profits. Now, I think that the over-all level of regulation of profits has been recognized by Mr. Evans as being in accordance with the proper approach to the utility position, the position of the Canadian Pacific. I don't think even Dearing and Owen, who have suggested that there is a possibility that we might go away from the fixing of a level of rates and just leave it for the fixing of the average level of profits -- I think that is as far as they have gone. Now, if the distinction is between private enterprise in the sense that it can go out and make as much money as it can on the basis of the law of supply and demand, in the Canadian Pacific of course we can.

COMMISSIONER ANGUS: But I understood Mr. Evans to say that you wanted a permissive income, and that there would be some limitation of aggregate earnings, in order to avoid the abuse of the monopoly, some such phrase as that. That seemed to me to suggest that permissive income would be probably rather higher than the financially practicable income, at any rate in the poorer years; and as a ceiling, it would only operate in what might be the rather good years, and that would give a certain incentive from the aspect of private enterprise that would not be apparent if you had closely controlled

and regulated returns on the requirements basis, shall we say.

MR. SINCLAIR: Yes, but I think, Dr. Angus, the situation is this: if rates were fixed on a rate base-rate of return technique, that is not to say that we are going to be able to earn that, and our incentive would be to earn it, either through efficiency or having our traffic of such a character as to enable us to maximize our plants. Now, I think there is sufficient incentive under that ceiling, which, as you say, will only become operative in good years, because my position is that there are times when no matter what the regulatory body might do, we could not earn adequate return on our investment. But I certainly don't think that is true today, nor has it been true for a good many years, say, five or six years. But in the depression years, with the Canadian Pacific a western railroad for two-thirds of its mileage, I don't think anything a regulatory body could have done would have enabled it to earn an adequate return on our investment, and I think that management would not have asked them to do so.

COMMISSIONER ANGUS: I agree with you, but what I wondered was that, assuming that in times like the 1930's, you cannot earn an adequate return on your investment.

MR. SINCLAIR: Yes.

COMMISSIONER ANGUS: Are you expecting in periods like the present to earn more than an adequate return on your investments so that on the average you earn an adequate one?

MR. SINCLAIR: Well, that comes down to what is adequate return in periods like the present. Well, here of course my own view is that dollar increments, not only

on the shareholders' equity alone but also on the fixed interest debt equity, should be returned in times like this, so there would be the incentive.

I don't know if I quite understood what you are putting to me, Dr. Angus, but the way I see it is this: at times like the present the Canadian Pacific stock should be very high, and what would make it high would be the return that was being paid on it. Now, that would leave enough room that when our earnings fell off in times of depression, we might be able to build up a surplus to enable us still to contribute the right sum to our owners. If what you are saying to me is that in times like the present, should the rate of return on the investment be high, I would say, certainly, because it is high on other industries where there is a comparable risk.

COMMISSIONER ANGUS: If you had a fairly high permissive income, I think is the word that you used, suppose that were once fixed.

MR. SINCLAIR: Yes.

COMMISSIONER ANGUS: Any subsequent revenue case would be an extremely simple matter, wouldn't it? You would simply say the income earned is less than the permissive income, that therefore permissive income is all right and it doesn't matter if we are earning as much as we can; and it is only if your actual earnings were above it that you would expect to have the rates somewhat reduced.

MR. SINCLAIR: Quite so.

COMMISSIONER ANGUS: I put it wrongly a minute ago. If your permissive income is high and your actual earnings are not up to it, then you have prima facie a case for higher freight rates.

MR. SINCLAIR: Yes, and it would be up to management to determine whether under the circumstances that were then existing, they would go before the Board for an increase on their standard rates.

COMMISSIONER ANGUS: Well, if the Board were directed by statute to work in this way, going for it would be a very simple matter.

MR. SINCLAIR: Quite so.

COMMISSIONER ANGUS: It would be a matter of ten or fifteen minutes.

MR. SINCLAIR: Well, knowing Mr. Frawley and some of my friends, I would make it at least half an hour.

MR. FRAWLEY: Forty-five minutes.

MR. SINCLAIR: But I think that one of the great advantages of what we are suggesting is that it enables these general revenue cases to be determined quickly, so that the railway rates can keep in step with the rest of the economy. I think that one of their great difficulties is that our rates have got out of step with the economy, and our great fight is to try to bring them into line, and the difficulties that are consequent upon that go right back into the time of price fixing prior to --

THE CHAIRMAN: Well, keep in step with me both upwards and downwards.

MR. SINCLAIR: Well, I don't say that they should keep in step so that they are lock-stepped. I think there has to be some relation, but it does not mean that every point that goes up and down there has to be adjustment in rates.

COMMISSIONER INNIS: Are you getting very close to Mr. Gordon's rate equalization fund?

MR. SINCLAIR: No, I think not. I think that

perhaps was brought out in the United States in some degree under the Transportation Act of 1920 when they had half of one per cent that could be added to the 5½ per cent which was to be a special fund, and that was found unworkable in the United States as far back as 1920. I look upon the earning power as somewhat in the nature of -- I don't know if I could use this phrase -- a hunting licence; that in good times that is when we can earn it; in poor times, well, of course, management could not earn it, and nothing that the regulatory body could do would enable us to earn it.

COMMISSIONER INNIS: I was wondering whether you are really planning to put on some plant in good times in order that you would be able to see it run in the poor times, which really becomes a sort of rate equalization fund, although it is not quite in fact.

MR. EVANS: Mr. Northey Jones said about 10 per cent return on the equity capital; he said that was the purpose of it, to ensure the payment of dividends in poor times when we could not earn the full amount.

COMMISSIONER ANGUS: If your amendment proposed were adopted and became part of the law, do you consider that the Board would under any circumstances be able to say: "Under present rates you are not getting your permissive income, but we cannot increase these rates because the economy cannot stand it." Would it ever be open to them to say that?

MR. SINCLAIR: Well, Dr. Angus, I don't think they would have the opportunity of saying that, because I don't think the Canadian Pacific would bother them on rate cases under those circumstances.

COMMISSIONER ANGUS: But it would be the forbearance of the Canadian Pacific, not the expression of the Board.

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MR. SINCLAIR: Don't you think, Dr. Angus that is a function of management anyhow? It is not our function to go up and disturb what is essential to our well-being and that is a good level prosperous country.

COMMISSIONER ANGUS: Of course, I think that is a function of management, and it is a matter of business judgment, but the question is, if your business judgment fixes one level, should the Board of Transport Commissioners fix a slightly lower level as what the economy will stand? Have they discretion, if your amendment is adopted, to enforce their lower level?

MR. SINCLAIR: I don't think it is the job of the Board of Transport Commissioners or any regulatory body to be passing on what they think the economy can stand.

COMMISSIONER ANGUS: Thanks, that is very clear.

MR. SINCLAIR: Canadian Pacific, therefore, if it is to continue to provide low-cost, efficient transportation in Canada, must be able to market equity issues, and to do this just and reasonable rates must be at such a level as will restore confidence of the investing public, which in due course will enable the common stock to be sold above par. From some of the remarks of Mr. Frawley during your proceedings, I can only take the inference that if Canadian Pacific needs equity capital, it should issue this equity capital at less than the par value of the shares. At present the Canadian Pacific is precluded by the Orders-in-Council authorizing the issue of capital stock from making issues at less than par, but even if this restriction was not in effect, the Company would not, I submit, issue ordinary stock at less than the present par. I think that this was made clear by Mr. Walker. Professor McDougall also, at Vol. 94, p. 17828 makes clear why it would not be good business to attempt to dilute the equity of present

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shareholders by a capital issue of common stock at less than the par value.

THE CHAIRMAN: Pardon me a moment, you say at present the Canadian Pacific is precluded by Orders-in-Council.

MR. SINCLAIR: Yes, you will recall, my lord, that we have issued 335 million of ordinary stock. Now we have authority under P.C. 252 of 4th February 1930 to further increase our ordinary capital stock by 165 million. That is, to make our ordinary capital stock 500 million; but in that Order-in-Council there is a restriction that there should not be or cannot be, under that Order-in-Council, there is a restriction that there cannot be an issue at less than par.

THE CHAIRMAN: What happened then under that?

MR. SINCLAIR: Well, we have never issued it.

THE CHAIRMAN: Never been able to exercise the authority?

MR. SINCLAIR: No, but the point I wish to make is that even if that was not in the order - -

THE CHAIRMAN: Pardon me, I cannot remember of course what the statutory provisions are, but would they have allowed the Order-in-Council to be made authorizing the procedure that way?

MR. SINCLAIR: Yes, I think so.

THE CHAIRMAN: That is, to make issues at less than par?

MR. SINCLAIR: I think that the Canadian Pacific could issue stock at less than par if it was not for the - -

THE CHAIRMAN: There is no statutory prohibition?

MR. SINCLAIR: No, not as I recollect it, but the point I wish to make - -

THE CHAIRMAN: In other words they have never made any use of that particular authority?

MR. SINCLAIR: Well, we never would, because I say it is self-defeating to transfer equity by issuing stock at less than par, and that we would not do it. We agree, I suppose, that we would not do it, and I think no business would -- it is simply foolhardy.

THE CHAIRMAN: And your stock has never been up to par?

MR. SINCLAIR: No, it has not been up to par. You have to have a certain amount of stability, and if it hits 25 you cannot step in the market with 100 thousand and expect it to stay there: it will drop.

---The Commission adjourned at 4:45 p.m. to meet again at 10:30 a.m. on Tuesday, May 23, 1950.

A.R.

ROYAL COMMISSION
ON
TRANSPORTATION

EVIDENCE HEARD ON

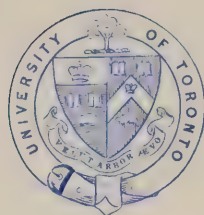
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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Tuesday, May 23, 1950

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ROYAL COMMISSION ON TRANSPORTATION

OTTAWA, ONTARIO
TUESDAY
MAY 23, 1950.

THE HONOURABLE W.F.A. TURGEON, K.C., LL.D., - CHAIRMAN
HAROLD ADAMS INNIS - COMMISSIONER
HENRY FORBES ANGUS - COMMISSIONER

- - - - -
G.R. Hunter
Secretary
- - - - -

COUNSEL APPEARING:-

F.M. Covert, K.C.	}	Royal Commission on Transportation
G.C. Desmarais, K.C.		
F.C.S. Evans, K.C.	}	Canadian Pacific Railway
K.D.M. Spence		
I.D. Sinclair		
H.E. O'Donnell, K.C.	}	Canadian National Railways
N.J. MacMillan		
H.C. Friel, K.C.		
J.J. Frawley, K.C.)	Province of Alberta
C.D. Shepard)	Province of Manitoba
M.A. MacPherson, K.C.)	Province of Saskatchewan

- - - - -

Ottawa, Ontario.
May 23, 1950 - Tuesday

MORNING SESSION

ARGUMENT BY MR. SINCLAIR (Cont'd.)

THE CHAIRMAN: Very well, Mr. Sinclair.

MR. SINCLAIR: At the conclusion of yesterday's hearing I was discussing the question of our capital stock and the fact that we would not issue at less than par because that would merely dilute equity. The company's authority to issue ordinary stock is found in 55-56 Victoria, chapter 35.

THE CHAIRMAN: Would you say that again, please

MR. SINCLAIR: 55-56 Victoria.

THE CHAIRMAN: What year?

MR. SINCLAIR: Chapter 35.

THE CHAIRMAN: What year?

MR. SINCLAIR: 1892.

THE CHAIRMAN: 1892, and chapter 55?

MR. SINCLAIR: Chapter 35. Section 3 of the Act provides that in addition to the capital stock --

COMMISSIONER INNIS: Chapter 55, did you say.

MR. SINCLAIR: Chapter 35, 55-56 Victoria.

COMMISSIONER INNIS: ^{Ch.} 55-56 Victoria.

MR. SINCLAIR: Section 3 of that Act provides that in addition to its capital stock previously issued and what might be issued in lieu of consolidated debenture stock as provided by Section 2 of the Act, the company is authorized to issue further capital stock as sanctioned by the shareholders if such issue is first approved by the Governor in Council.

Under that provision the Governor in Council has issued five Orders in Council, the last one being P.C. 252

of February 4, 1930 which was the one I referred to yesterday. In all of these authorizations, there is this limitation or restriction that they can be issued provided that they are not at less than par. As I pointed out yesterday, we of course do not feel that that restriction is in any way detrimental to our position because we would not issue stock at less than par.

THE CHAIRMAN: As a matter of fact, have you issued any since that statutory provision?

MR. SINCLAIR: Oh, yes. At the time that statute was passed our ordinary stock issued was \$ 65 million; and since 1892 we had issues ^{authorized} in 1902, 1904, 1906, 1908, 1912 and 1913.

THE CHAIRMAN: You were above par in those years?

MR. SINCLAIR: Yes.

THE CHAIRMAN: In all those years?

MR. SINCLAIR: Yes.

THE CHAIRMAN: 1913 was the last?

MR. SINCLAIR: No. That was the last authorization, and we made the issues over the years and we got our final authorization on February 4, 1930. But of that authorization of \$ 165 million we have not issued any because we had never had our stock sufficiently above par to enable us to do so.

I just want to make this clear. In Ex Parte 168, and this is in reply to a question Dr. Innis put to me, that return of 4.03 was on a constructive year, 1949. The I.C.C. took it on a constructive year. Those various rates of return I gave to you for various roads were on 1948 actuals, based on the information that was available from cases and the information that was filed in those two exhibits referred to by Mr. Smith.

COMMISSIONER ANGUS: Do you know of any case anywhere else where a rate of return is fixed in relation to the cost of raising new capital?

MR. SINCLAIR: The leading authority on that proposition is this Bluefield Water Works and Improvements Company versus The Public Service Commission that I quote from at page 25 of my notes. That lays down the principles upon which a rate of return should be fixed. The text books refer to that case as a leading authority. That was the case of a waterworks company ⁱⁿ which the Supreme Court held that a return of 6% was not sufficient.

COMMISSIONER ANGUS: I see that, Mr. Sinclair, and if I may, I should like to quote from page 26 as follows:

"The public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties."

MR. SINCLAIR: Yes.

COMMISSIONER ANGUS: That is rather different from saying that a rate of return should be the rate which, given our investment, will enable us to raise new capital. You are taking something that is a rate on many things and applying it to a single thing in isolation. Do you know of any case in which that has ever been done?

MR. SINCLAIR: The only thought that I have on that is if we turn to these utility companies like an electric utility. We will take, for instance, the B. C. Electric. It cannot really be compared with any other electric utility in that area because it is the only one. In that case they considered the various factors as to what would be an equitable return, and the credit standing, and the ability to market stock was one of the bases upon which they went.

THE CHAIRMAN: You give that case?

MR. SINCLAIR: I deal with that case, yes. As the Bluefield Water Works Case said, and as I quote it, I think it is a matter for the exercise of fair and enlightened judgment. I think that it is of the greatest importance.

THE CHAIRMAN: Where are you quoting from there?

MR. SINCLAIR: That is at page 26. But there are other factors that I think I should like to discuss in connection with the rate of return of the Canadian Pacific; and when I come to that point, if there is some issue that I can be of assistance on, I shall be very glad to discuss it.

COMMISSIONER ANGUS: The reason I am asking the question is this. If a rate of return were merely the multiplier necessary to give you an income which will permit new investment, it does not matter what your rate base is. Suppose you come forward and ask for a rate base of one thousand million, and Mr. MacPherson says no, eight hundred million is all that is fair. Would you not say, let us just have it there at eight hundred million but our multiplier instead of being 8% becomes 10%.

MR. SINCLAIR: Of course, Dr. Angus, what will attract capital is an important factor, but it is not the only factor. If it was the only factor, what you say of course would be true. But then there are two factors to a rate of return. One is that you have to protect the capital already in the enterprise and treat it fairly and the other one is that you have to have earnings of such a rate which enable you to attract capital under honest, efficient management and under the circumstances that are existing at the time.

THE CHAIRMAN: The last sentence of that quotation

on page 26 illustrates what you mean.

MR. SINCLAIR: Yes, that is right. There are a number of issues that put the Canadian Pacific in a rather favourable position in regard to this that I tried to deal with in my notes; and if I may, I should like to discuss them.

(Page 23567 follows.)

COMMISSIONER ANGUS: I do not want to anticipate too much, but the question I should like to ask is this. The rate base matter would apply to both your arguments, would it not, that is to say, if what matters is the product of the rate base on the rate of return and the rate of return had been cut adrift as you cut it adrift from anything that happens in other industries, then it is indifferent whether the rate base is low and the rate of return high or the rate base high and the rate of return low as long as you keep the product constant.

MR. SINCLAIR: I do not mean to cut it adrift from other industries. I certainly do not think you can look at the Canadian Pacific totally removed from other industries. Our needs for capital are part of private industry's needs for capital. We have to look at the Canadian Pacific in relation to these other people who are in the capital market. Therefore I do not cut it adrift. The only thing is there is not a comparable situation in Canada, another railway company side by side with myself that I can look to. For that reason my difficulty is maybe a little greater. Then of course I have other factors that make it easier, I think, to find an equitable rate with the Canadian Pacific. I do not think you can take a railway utility and treat it differently than you would treat a communications utility like a telephone company, or a public utility supplying electricity or water, or any other service utility that is providing a service under regulated rates, and there are many of those. At the bottom of page 23 and the top of page 24 I quote from the transcript as to the fact that transfers between shareholders are in the end self-defeating.

The transcript at page 17828 records:

"Mr. Evans: Q. Is what you have been saying related to the matter of the transfer of capital between security issues, or what we may call dilution of equities?

"A. Yes, I think it is, because it is not proper to introduce new capital under conditions which will transfer to its providers part of the equity which has been built up by earlier investors.

"That may or may not be good ethics. But the economist, I think, is compelled to say that any attempt to make such transfers as between capitalists is, in the end, self-defeating."

I submit that on the long run it is clearly wrong in principle to consider a rate of return which will not enable capital to be attracted for equity issues at a price per share approaching the book value per share. I, of course, accept the fact that at some periods and under certain circumstances, for example in the depression years, equity issues of railways could not have been made marketable by any action open to the regulatory body.

This brings me to a point which I touched upon earlier and that is that by using an actual cost rate base, some modification would be required to reflect the changing value of money. You will recall in dealing with rate base that I referred to the conclusions of Dr. Locklin and Dr. Bigham. Both of these economists have admitted, Dr. Locklin possibly more positively than Dr. Bigham, that by using an actual cost rate base some modification should be made to compensate stockholders for the changes in the value of money, and that the

The committee has been very busy;

and I think it is the intention

to have a meeting in the morning,

and I think it is probable

that I will be there, because it is

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reflection of the changes in the value of money would be in the rate of return.

There is one point which I think should not be overlooked. Fortunately Canadian Pacific management has invested the shareholders' money from time to time in other than rail investments, some of which have, at least in recent years, paid good returns. This has enabled the Canadian Pacific common stock to sell at the figure it is at today. Without other income, undoubtedly the common stock price would be extremely and disastrously low. The other income is very largely responsible for holding the ordinary stock at \$18 plus on the market. I think today's quote is \$18. Rail earnings would not justify this price. Other income of Canadian Pacific is a benefit to the freight payers because it would act as a cushion in the manner described by Mr. Northey Jones in his evidence in the 20% Case and would undoubtedly attract equity capital at a lower rate than if the Company was a purely rail enterprise.

I would also like to say that even though the Company was for a number of years forced to pass dividends on its common stock, as well as for some years on its preferred stock, I submit the confidence of the public in the efficiency of Canadian Pacific is at a high level. This factor, together with the tremendous advantage of other income, has enabled the Company to secure debt capital on favourable terms, as witness our last issue at 3 1/8.

Because of the efficiency of Canadian Pacific management and its other than rail investments, I submit a modest rate of return, in light of the risks of rail investment, would enable the ordinary stock of Canadian Pacific to be sold on the market at a premium over par.

There is the point I wish to make, Dr. Angus, that Canadian Pacific is in a fortunate position. The stock price depends on the corporate position and not only on its rail position. The corporate position of the Canadian Pacific has enabled the stock without any rail earnings at all to be six or seven points off par. Therefore with any kind of return at all on the rail investment that was reasonable or fair it is only logical to assume that capital would have come to the Canadian Pacific at a much lower rate than if it were just a rail company. I think that would be a factor that would be taken into account in determining how much we had to have to attract capital.

COMMISSIONER ANGUS: But you want the rate of return to be such that it would keep your stock at par even if there were no outside income.

MR. SINCLAIR: Quite so. I think that a fair rate of return on the rail investment would put the stock of Canadian Pacific at par by itself, and that the other investment would put the stock very considerably above par. That is why I say that it should approximate the book value per share which is, roughly speaking we will say, twice the par value.

The considerations that are taken into account in fixing a fair rate of return have been stated by the Supreme Court of the United States in the case of Bluefield Water Works & Improvements Company v. Public Service Commission (1923) 262 U.S. 679, at pp. 692-4. This case was cited in the Ottawa Electric Case by the Board of Transport Commissioners, and I wish to read a short extract out of the quotation from the Bluefield Case as found in the Board's judgment, reported in 59 C.R.T.C., at p. 168:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant factors. The public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management to maintain and support its credit to enable it to raise the money necessary for the proper discharge of its public duties."

What rate of return should be granted is a matter for the Board. In assisting the Board, Canadian Pacific would of course introduce evidence to meet the principles that I have been speaking about. If the Board found as a rate base, the actual cost of the investment in railway property of Canadian Pacific Railway Company, and applied an equitable rate of return to that property, it would, I submit, be carrying out its duty under the Act and would enable railway transportation to be afforded to Canada on an efficient and low-cost basis.

COMMISSIONER ANGUS: I want to repeat my question

there. If an equitable rate of return is computed independently from what other enterprises are earning I can see the meaning of this but if an equitable rate of return is the rate which will bring your stock to par, if that is its definition, I do not see that it matters what your investment is valued at, and for that matter I do not see that this whole calculation matters in the least. You could simply go to the Board and say, "Our stock is quoted below par and therefore railway rates must be raised."

MR. SINCLAIR: Oh, no.

COMMISSIONER ANGUS: Is this not all negligible on that argument?

MR. SINCLAIR: No, that is not my argument, with respect, Dr. Angus. My argument is that there is a certain risk in owning the ordinary stock of Canadian Pacific. That risk should not be made greater by an action of a regulatory body by not providing a fair return under all the circumstances. By giving us only the rates that they have authorized in recent years they are making that risk considerably greater, and I say that is wrong. It is wrong under the present Act, and would be put beyond doubt with an amendment such as we propose. I want to make it very clear that the ability of the Canadian Pacific to attract capital must be taken along with all other utilities that are regulated and are in the market for capital. It certainly was not my intention to make the calculation for the Canadian Pacific alone. If I have left that impression I am sorry. That is not true. It must be looked upon as a utility in the market. It has to compete not only with Canadian utilities for money but with American utilities for money because it may well be that sometimes it would have to go to the American market for money.

COMMISSIONER ANGUS: Yes, I understand that aspect of it, but if American railways, regulated as they are and with the rate of return which has been allowed to them, are obliged to sell their stock a good deal below par, if they sell it at all, won't that risk carry over to the Canadian railway unless it is made clear that it is regulated in some totally different manner? The manner you have proposed is totally different.

MR. SINCLAIR: Oh, yes, of course, but you see, Dr. Angus, I think there is a rather mistaken view that may have arisen from some of the remarks of my friends from the provinces. For instance, the Santa Fe, if it wanted to make an equity issue today, certainly could make an equity issue. The fact is that it has not required one. Now, when you say that American roads have not been able to make equity issues, certain of them certainly could make equity issues on the market; some of them have followed policies of finance that have withheld tremendously from their shareholders what they could, what they have earned per share, because they are very frightened of a recession or even a depression, and they don't want to be in a position where they have to pass dividends, as did many of the roads in the 1930's which had a tremendous effect on their investor confidence in those roads and still has a tremendous effect.

Now, all I am saying is this, that to be fair to the capital that is in the Canadian Pacific, to enable the Canadian Pacific to secure equity capital, a fair return on the investment is required. Now, what factors the Board should take into account in fixing that return, are the principles I have been speaking of. If there are other principles that the Board think are relevant, of course that is a matter for discussion before them.

I don't think that there are other principles than those that I have been speaking about. All I say to my friends from the provinces, Dr. Angus, is, because of our situation, because of our other income, this tremendous fear of theirs that they have to go a long way to bring the stock to par, is not realistic. It would take a very modest return on rail earnings to put Canadian Pacific stock much beyond par, in my view. Now, I don't know if I am meeting your point, if I understand you, but that is - -

COMMISSIONER ANGUS: I think I can put what I have to say in this way, that in your written argument, apart from the quotation on page 26, there is no reference to other utilities, and in the absence of any such reference it seemed to me your argument was open to the criticisms I used.

MR. SINCLAIR: Well, I was deficient in that, because my thought was that I was drawing my argument into the position where I was going to accept and make part of my argument the views of the Supreme Court as set out in this Brief.

THE CHAIRMAN: Now then, you submit in the first place that by the law as it stands, it is the duty of the Board to grant you what you are asking for?

MR. SINCLAIR: Quite so.

THE CHAIRMAN: By the laws as they now stand.

MR. SINCLAIR: Quite so.

THE CHAIRMAN: Secondly you ask for this amendment proposed by you, simply to clarify the law?

MR. SINCLAIR: Well, more than that. I deal with that following what I am coming up to now, the reasons why I say we need that amendment and why I say it would be useful. If you want to say it might be psychological, that is a factor we certainly have to deal with in freight

rate matters.

THE CHAIRMAN: There is this question: has the Board ever recognized this legal obligation which you now say rests upon it?

MR. SINCLAIR: These quotations I gave at the commencement of my argument, I say, recognized that.

COMMISSIONER ANGUS: Are not you saying or very nearly saying, that, given the fact that there is no water in your stock, that unless the stock is selling at par, any legal limitation on your freight rates is depriving you of property rights?

MR. SINCLAIR: That is right. Well, I think it is quite obvious, Dr. Angus, that a return of less than two percent on our investment certainly is depriving us of property rights. I would say that is pretty nearly a prima facie case.

Mr. Shepard in his argument (Vol. 119, pp. 21559-61 and 21570-72) made it clear that the Canadian Pacific should be the yardstick in freight rate matters and that it should continue as a private enterprise. Manitoba, as I understand their position, are not prepared to accept the fact that the rate of return on the rail investment of Canadian Pacific must be such as to enable the Company to attract equity capital. I think it is fundamental that if the Canadian Pacific is to remain a private enterprise it must be able to secure equity capital, (I think that is basic). I submit that Manitoba's argument really resolves itself into this, that, in spite of the tremendous prosperity in Canada at present and during recent years, its undoubted potential for expansion and continued prosperity, Canada cannot afford efficient, low-cost railway transportation on the only truly economic basis, which is that the users of railway services should pay

the cost of providing such services. I seriously question whether the people of Manitoba, with a full understanding of the facts, would support the pessimistic outlook of Mr. Shepard.

As your Commission knows, it was our view that an amendment to the Railway Act was not necessary to have the general level of rates provide an equitable return on the rail property investment of Canadian Pacific.

In view, however, of the submissions of the Provinces in regard to what constitute requirements - -

THE CHAIRMAN: That is where you differ?

MR. SINCLAIR: That is right.

THE CHAIRMAN: You and the provinces. You say the requirements are really this return. How would they define your requirements?

MR. SINCLAIR: For instance, Mr. Shepard says there is no duty on the Board to protect the credit standing of the Canadian Pacific so that it can go out in the market to compete with other industries for capital.

THE CHAIRMAN: What does Mr. Shepard, for instance, say are your requirements?

MR. SINCLAIR: Well, Mr. Shepard says our requirements are expenses including taxes, our fixed debt and some surplus and some return to the shareholders.

THE CHAIRMAN: Dividends?

MR. SINCLAIR: Yes, but he does not say that that return must be such that it will be comparable or equitable in relation to other returns for other industries in the money market. Now, I hope I have correctly expressed his view. If I have not, I am sure in his reply he will correct it.

In view, however, of the submissions of the provinces in regard to what constitutes requirements, the apportionment of dividends (I think that is another

important view) and the treatment to be accorded Other Income, as well as the submissions of Canadian National, (I am putting all these other factors before the Canadian National view), it is, the view of the Canadian Pacific that the Board should have statutory guidance in regard to Canadian Pacific investment in rail property.

Counsel for some of the provinces have made statements and proposals from which I can only infer that it is their view that the Board is not under a duty to fix a general level of rates sufficient to provide a fair return on the investment of Canadian Pacific in rail property. I say that the Board is under such a duty under the existing law ---

THE CHAIRMAN: When you say "under the existing law", are you referring to any specific part of the Railway Act?

MR. SINCLAIR: Section 325 and the jurisprudence of the Board.

THE CHAIRMAN: You mean you think that in so far as the railways are concerned, "just and reasonable rates" means just exactly what you say.

MR. SINCLAIR: That is right.

THE CHAIRMAN: Rates which will enable the railway to go into the money market with an equal chance with other industries also in the money market.

MR. SINCLAIR: That is right, with comparable risks.

THE CHAIRMAN: Yes, with comparable risks.

MR. SINCLAIR: And I think the Board in those cases I referred to earlier in my argument have said so.

THE CHAIRMAN: In that case then your suggested proposal is already there, you would say?

MR. SINCLAIR: Yes, but I say that the matter - -

THE CHAIRMAN: Of course, in this country you bring it down to the Canadian Pacific because it happens to be the only ---

MR. SINCLAIR: Well, it is the only railway company of any size that has to have a credit standing. The Canadian National does not have to have a credit standing because its credit standing is the credit standing of the Dominion. That is why I say we are in a unique position, and that is why ---

(Page 23581 follows)

THE CHAIRMAN: What has been your experience in the past, then? I thought it had not been as fortunate as you seem to say now it has been. What has the Board done with you? Has the Board accepted your interpretation of section 325?

MR SINCLAIR: No, my lord.

THE CHAIRMAN: It has not?

MR SINCLAIR: No.

THE CHAIRMAN: You told me a while ago that you showed where the Board did admit that they had to provide you with a fair return on your investment; is that so?

MR SINCLAIR: That is right.

THE CHAIRMAN: Well, where is the difference between you and the Board, then?

MR SINCLAIR: Well, of course, you see, I say that they have not given effect to the principles that are laid down in their own jurisprudence.

THE CHAIRMAN: Although they admitted they had not done it?

MR SINCLAIR: Well, I do not think the recent decisions of the Board, in the 21% Case and the 8% Case and the 16% Case, have followed the jurisprudence of the Board; I do not think they have.

THE CHAIRMAN: They have departed, then, from their own---

MR SINCLAIR: From the earlier statements of what was their duty.

THE CHAIRMAN: Made how long ago?

MR SINCLAIR: Well, the last statement was made in 1927, but the earlier statements were made in 1914 and 1922.

THE CHAIRMAN: So that your amendment, you say, would bring them back to the point from which they departed.

MR SINCLAIR: Quite so, yes. And I also think, my lord -- I do not want to be unkind, but this harangue that has been carried on concerning freight rates by my friends has got a sort of smoke screen around this thing, and I think they have convinced themselves -- I honestly think that they have convinced themselves -- that freight rates are now too high, or that if they go higher they will be too high. With respect, they have got their eye off the true issue.

THE CHAIRMAN: You are referring to the Provinces

MR SINCLAIR: Yes, I certainly am.

THE CHAIRMAN: Then they must have led the Board with them.

MR SINCLAIR: Well, they are very persuasive people, they are very persuasive people; and, as Mr. Carson says, they have got a little persuader in the Act too, in section 52(1).

I say counsel for some of the Provinces have made statements and proposals from which I can only infer that it is their view that the Board is not under a duty to fix a general level of rates sufficient to provide a fair return on the investment of Canadian Pacific in rail property. I say that the Board is under such a duty under the existing law, that the matter is too important to be one that is open to controversy, and that the matter should be set at rest by an amendment to the Railway Act. I wish to emphasize that it is not our view that the Board's discretion need be limited by having the statute delineate the method of determining a fair and reasonable rate base or what would be an equitable rate of return. I am quite prepared to take my chance of convincing the Board on those matters.

COMMISSIONER INNIS: Don't you think you are

taking on a great deal in this paragraph? You say the matter is too important to be one that is open to controversy; I wonder if it is not too important to be closed to controversy.

MR SINCLAIR: Well, what I mean by that is this, that my friends from the provinces, Dr. Innis, admit that the Canadian Pacific should remain a private enterprise, and secondly that the Canadian Pacific should have adequate earnings. Now, the question of what is adequate earnings obviously is one that will protect the capital in the company and enable other capital to be attracted to it, but, having gone that far, we then see the position of Manitoba. Manitoba says no, Mr. Frawley says no; they say, "That is not right; the Act does not require the Board." I say it does require the Board, but let us not have a useless argument about this thing for weeks on end before the Board, let us have it established as the law. I say it is the law, but let us put the law, let us codify it, put it beyond controversy. I mean, if it is the law, let us not have any argument about it, because it is just a waste of time.

COMMISSIONER INNIS: My difficulty is that you really make the Board the pre-eminent planning authority for the whole economy of Canada if it uses this particular yardstick or uses these particular principles which are laid down. As I say, it is really a paraphrasing of Clemenceau's remark, that war is too serious a matter to be left to generals.

MR SINCLAIR: Well, of course, you see, Dr. Innis, that would be true if I were asking this Commission to recommend that they should have in the statute that the Board must provide a return of we will say 7 per cent on the rail investment, but I am not saying that. I am saying that it

is for the Board to say what the fair return is under all the circumstances and on the evidence we present and what they gather themselves. Now, of course, on the other point, Dr. Innis, I do not think that the economy is at the mercy of the Canadian Pacific; I think that the Canadian Pacific and the economy are so inter-related that you cannot say the economy is dependent on the Canadian Pacific, but you certainly can say that the Canadian Pacific is dependent on the economy.

COMMISSIONER INNIS: I agree with you completely, but I am only fearful that you are introducing a certain rigidity in terms of the position of the C.P.R. which may be of considerable disturbance to the economy.

MR SINCLAIR: Well, I do not think so, Dr. Innis. For instance, the Board in the 21% Case on the requirements base resulted in a return of $5\frac{1}{2}$ per cent. Now, I say that was too low, but say that the Board had given us a greater amount of surplus or found greater dividends or something like that, and it worked out to $6\frac{1}{2}$ per cent; now, they could do exactly the same thing here; they could find $6\frac{1}{2}$ or $5\frac{1}{2}$ or $7\frac{1}{2}$, whichever I was able to convince them or which the Board felt was reasonable under all the circumstances. I am not making this rigid; I have drawn this in such a way that it is not rigid; that is the reason why it is drawn in the way it is.

COMMISSIONER ANGUS: Can you clear this up for me? You say the matter should be set at rest by an amendment to the Act, but that the method of determining a fair and reasonable rate base and an equitable rate of return would be left to the Board's discretion.

MR SINCLAIR: Yes.

COMMISSIONER ANGUS: Now, if you have occasion to go to the Supreme Court, by the Act, if your amendment is

law, rates must be just and reasonable, and they are not just and reasonable unless they do certain things.

MR SINCLAIR: Quite so.

COMMISSIONER ANGUS: The Board, let us suppose, in exercising its discretion has taken some account of the position of the public, of the shippers, has thought of rates just and reasonable to them as involving some sort of economic expediency. Would you be in a position to go to the Supreme Court and say that was a wrongful exercise of the discretion?

MR SINCLAIR: I say no.

COMMISSIONER ANGUS: I beg your pardon?

MR SINCLAIR: I say no.

COMMISSIONER ANGUS: You think so?

MR SINCLAIR: I say no, I would not be able to go. I would have to go to show that they were taking my property wrongfully, that it amounted in effect to a confiscation without any compensation. That would be the only way I could go. That is why I have left this in this way; I do not want to tie the hands of my friends from the Provinces.

COMMISSIONER ANGUS: Isn't it your argument that it does amount to a confiscation? I think you told me that a few minutes ago, if there is a legal limit to your rights that stops you from charging rates that would give the best return, assuming that you are not earning an income that would have your stock at par.

MR SINCLAIR: That is right; but I have not gone to the Supreme Court, and, as you know, with the discretion, Dr. Angus, I have to have a pretty strong case before I can make out a case of a wrongful exercise of that discretion; but I say that it is coming close. I think that we have a case today, but it is one thing for me to think I have a case and it is another thing for me to prove I have a case.

That is why I want to leave it discretionary and broad, and that is why it is drawn in the way it is, and it is no use to turn to me and say, as some of my friends have said, that I am back to the position of 1920 in the United States under 15(a) of the Interstate Commerce Act; I am not.

COMMISSIONER ANGUS: It seems to me that the issue between you and the provinces -- I don't know whether you agree with this -- is more or less this: Do the words "just and reasonable" import some idea of what is economically expedient and of what the economy can stand? As I understand it, the provinces say that they do, and that if they do not they should, and it should be amended to do so, and you say that they do not include it, and that if they do include it it is expedient that there should be this amendment to make it clear that they do not.

MR SINCLAIR: Quite so. I say that the economic effect of freight rates is shown in the general level of the economy, and it has no place in the statute, it has no place in a definition of what are just and reasonable rates. My friends are protected, in the fact that the Canadian Pacific is part of the economy. You would think to listen to them that we were something that was apart, that we had nothing to do with it, and they try to keep us in a position where we are not part of it, in the sense that we are in step with it, and they have been trying to do it for three years, and I must say have been rather successful.

COMMISSIONER ANGUS: Now, are these rates asked for by the Railway Association of Canada -- is that the process -- including the Canadian National?

MR SINCLAIR: Well, of course, it would be up to the Canadian National to say whether they would go along

with this; they have always in the past.

COMMISSIONER ANGUS: Yes, but suppose they would not go along with that, with the rates that you consider necessary to give you this return; would the rates which the Board might fix then depend on the request from the Railway Association, or would they be under the statutory obligation to fix just and reasonable rates, and rates could not be just and reasonable unless they did certain things?

MR SINCLAIR: That is why I say that this is a minimum; this makes this a minimum; this does not mean to say that the Canadian National could not come in with an application and say, "We have to have a return on our investment." I say what this will do is say that any rates you fix cannot be lower than, any general level of rates you fix under this amendment cannot be lower than, and that leaves my friends from the Canadian National or the T.H. & B. or the Algoma Central---

COMMISSIONER ANGUS: As I understand it, you mean that this would enable the obtaining of the level of rates that you think is due, even if the other railways did not join with you in asking for that level of rates?

MR SINCLAIR: Quite so.

COMMISSIONER ANGUS: And that they would be forced to charge that higher level of rates even if they did not want to?

MR SINCLAIR: Well, of course, Dr. Angus, I think, looking at the Canadian National and the Canadian Pacific, that they would not be in a position to charge less. I do not think that they would be in a position to charge less. I am confident of that, because I of course believe that a return on their cost includes a return to the people who put up the money, and that is the taxpayers, of whom I am

one and of whom the Canadian Pacific is one.

COMMISSIONER ANGUS: But suppose as a matter of policy they wanted to charge less. Mr. Fairweather has told us that he does not agree with Mr. Walker, that he thinks rates cannot be raised without damaging the economy; and suppose you have gone ahead and got your ceiling, the high ceiling that you think is justified, and the Canadian National, not agreeing with you, charge lower rates; you would have to meet their lower rates, wouldn't you?

MR SINCLAIR: That is true, I would have to meet them, but that would be the same as Canadian National saying that they were going to take moneys from the taxpayer, because they would certainly operate at a deficit under those circumstances. They would be taking moneys from the taxpayers to subsidize only one part of the taxpayers, the shippers and receivers of freight. That is what it amounts to, and I do not think the Canadian National would do that. I do not think the people in this country would stand for it. It would certainly be an unrealistic approach to the operation of a railway.

We do believe that by following the rate base-rate of return technique, many of the problems such as Other Income and apportionment of dividends, which have proved so vexatious in the last two rate cases before the Board, would be overcome. We are strongly of the view that once a rate base was established, the Board would be able to deal with rate cases -- that is, general revenue cases -- in a much more expeditious manner than it has been able to do in the past.

Canadian Pacific therefore urges your Commission to recommend to Parliament that just and reasonable rates must be rates which, taken as a whole, provide a fair return

upon the investment in railway property of Canadian Pacific Railway Company, and to accomplish this we suggest that you recommend that Parliament enact legislation to the effect of that proposed by our suggested amendment to Section 325 by the addition thereto of subsection 7 as drafted.

I now turn to the second of my subjects, and that is Traffic Matters. Those arise under clause 2(b).

Traffic Matters - Rate Structure

Clause 2(b) of P.C. 6033 mentions a number of specific types of rates and it is my intention to now discuss these rates and others which make up the Railway rate structure.

I think it might be useful to recall to you an extract from the evidence of our Chairman, Mr. Walker, at the opening session of the Commission on May 2nd, 1949. Mr. Walker said, (Vol. 1, p. 12):

"The freight rate structure of Canada upon which the railways primarily depend for their revenues, since passenger traffic is relatively unremunerative, is by no means the hodge-podge borne of accident or expediency which it is so often said to be. It has been regulated for the past 46 years by an independent tribunal presided over by a great many men of outstanding ability whose judgments command respect and are consistent alike with reason and with the decisions of similar tribunals throughout the English-speaking world. Those decisions, we suggest, will not lightly be disregarded by the Commission."

THE CHAIRMAN: While we are there, this is not quite pertinent now, but I would like to know: Can you remind me of what figures the Canadian Pacific gave us of

this passenger traffic deficit? You can get it later.

MR SINCLAIR: I will have it looked up. Of course, when you speak of deficit, we are not saying that it operates at an out-of-pocket loss, you know.

THE CHAIRMAN: You are not saying it operates at an out-of-pocket loss?

MR SINCLAIR: No. You recall Mr. Walker said there is a great deal of dispute as to whether passenger traffic is---

THE CHAIRMAN: Well, he says it is unremunerative.

MR SINCLAIR: Relatively, relatively unremunerative. It is relatively to other types of traffic moving over the railway.

THE CHAIRMAN: Yes, but when you use the word "unremunerative"---

MR SINCLAIR: That does not mean non-compensatory, of course.

THE CHAIRMAN: It does not mean non-compensatory?

MR SINCLAIR: No. You see, it may not bear its full proportion of cost.

THE CHAIRMAN: Well, I do not want to get into an argument; I want to get those figures you gave me.

MR SINCLAIR: All right, I will see to that.

Now I would like the reporter to take into the record the next part, and I turn to the bottom of page 31. (Portion taken into the record follows):

By its charter, Canadian Pacific must forever operate its railway efficiently. (44 Vic., Chap. 1, Clause 7 of the Schedule) Under the Railway Act (Sec. 312) the company is under a duty to provide adequate and suitable accommodation for receiving, carrying and delivering all traffic offered. Traffic must be received, forwarded and delivered with due care and diligence and without charges

that are unjustly discriminatory or unduly preferential (Sec. 316). Railway lines cannot be abandoned without the approval of the Board (Sec. 165A), and services cannot wholly be discontinued without the Board's approval. There are a number of other sections of the Act which give the Board control over railway facilities. The Railway Act makes it abundantly clear that a railway company is compelled to operate its railway enterprise and as a corollary to this obligation is the right to receive just and reasonable rates for traffic carried.

The shippers and receivers of traffic moving over the Canadian Pacific are constantly requesting better and faster service to meet the needs of modern business. Canadian Pacific is attempting to meet these requests and Mr. Newman (Vol. 93) has given considerable evidence in regard to the capital program the company would like to carry out to improve facilities and operating efficiency if sufficient funds can be made available. Professor McDougall (Vol. 94, p. 17836) expressed the view that railway means are so restricted "that wholly certain and valuable savings from new capital investments are inhibited".

An examination of the matters coming on for hearing before the Board will show that few complaints are directed towards the provision of railway facilities or the handling of traffic. By far the majority of cases deal with the matter of rates. This is not, I submit, because railway management has been any more effective in providing transportation facilities and service than in dealing with the charges for such service. It arises because of the fact that shippers and consignees are forever anxious to secure rail transportation at the lowest individual cost and they will not make the effort or are not interested in

looking at the rate structure as a whole.

Your Commission has heard a welter of complaints about freight rates, both as to their level and how they are made. One might wonder, I submit, with some justification, if the complaints that are made are sound, how Canada has prospered to the tremendous extent that it has.

Complaints concerning the general level of rates, as well as individual rates, are much more persistent and numerous when there is an abrupt change in the price level, which necessitates wide changes in rate charges. This was the experience during and following the First World War. During the Second World War, rates were frozen until 1947, and the concentrated opposition to an equitable freight rate structure which has manifested itself in connection with the proposals of the Railways for rate changes is, I submit, intensified because of the fact that rate charges did not increase as quickly as prices generally.

Canada has, for some years, been in a period of rising prices. Increased prices have resulted in increased costs of providing railway service. Freight rates cannot be immune to these changes in the economy. As the Railways are a regulated industry, increases in their charges are given the full floodlight of public inquiry. Canadian Pacific does not suggest that this is wrong. What is wrong is undue obstruction and delay born of an unwillingness to face the necessities of the situation.

Some of the amendments which have been suggested to the Railway Act by the Provinces and others would, I submit, not only have a disturbing and detrimental effect on Canadian trade and commerce, but would hamper a reasonable level of rates being established under which railways could secure the revenues required to provide the most efficient transportation service.

(Page 23591 follows)

With your permission, I propose to discuss the rate structure in what appears to me to be a logical sequence. In dealing with the various parts of that structure, I will discuss any traffic amendments that have been suggested.

The freight rate structure is based on three types of tariffs, as provided in Section 328 of the Railway Act. These are Standard, Special and Competitive.

Another factor basic to Class Rates is the Freight Classification, which is provided for in Section 322 of the Act. In Canada there has been a standard freight classification since 1884, when Canadian Freight Classification No. 1 became operative. The first Classification submitted for the approval of the Board was Canadian Freight Classification No. 12, which became effective on May 1st, 1903. (Present Classification No. 19 has been in effect since June 15, 1937). -- Although since that time there have been twenty-one supplements, five of which are now in force. -- The Board, I submit, has unfettered jurisdiction in classification matters and has approved the existing Classification and must approve all changes before they become effective. All ratings in the Classification apply uniformly throughout Canada, as do all Rules, with the exception of the Mixed Carload Rule, which has a different application in Eastern than in Western Canada.

The difference in the Mixed Carload Rule is of long standing. The position of Canadian Pacific on this matter is that it has no objection to the establishment of a uniform mixing privilege throughout Canada. (p. 1 of Appendix to Part I of Canadian Pacific submission). Mr. Jefferson's evidence on the mixing rule may be found in Vol. 81, pp. 16142- 46. The approval of the Board would undoubtedly result if there was agreement between all shippers and consignees and even without agreement the

Board could, under existing law, order a uniform mixing rule made applicable throughout Canada.

I would refer the Commission to the Judgment of the Board in General Order No.421 of July 17th, 1925, dealing with "Approval of Canadian Freight Classification No. 17". The Board, in its Judgment, gives a complete history of the Mixing Rule from 1893. This can be found in Volume 15, J.O.R. & R., commencing at page 181.

Mr. Shepard (Vol. 118, pp. 21416-7A) suggests that the number of classes be extended so that the standard rates would include all the existing class rates and "a large number if not all of the present commodity rates". Canadian Pacific is definitely opposed to this proposal. Our view is that we require the three types of tariffs specified in Section 328.

Mr. Shepard might have left the inference that Mr. Jefferson supported Manitoba's proposal. I say this is not so. What Mr. Jefferson did support was the possibility of working additional classes into the classification. He did not at any time envisage having all the class rates that are lower than standard and all the commodity rates put into the standard mileage rates. To do this would create rigidity in the rate structure. The changing of commodity rates to class rates is summed up by Mr. Jefferson in Vol. 82, p. 16328, in this way:-
Here he is referring to the experience in the United States.

"I don't know how they are going to work it all out without a dislocation of industry. I don't know. That is something that remains to be seen. My belief is it is a long way off yet."

THE CHAIRMAN: Will you clear up one point for me.
A few sentences up you say:

"Mr. Jefferson...did not at any time envisage having all the class rates that are lower than standard and

all
/the commodity rates put into the standard mileage rates."

MR. SINCLAIR: Yes.

THE CHAIRMAN: Would you explain to me what you mean by a class rate that is lower than the standard rate?

MR. SINCLAIR: One is the distributing class rate; another is the terminal class rate and another is the competitive rate.

THE CHAIRMAN: You are putting in the competitive rate.

MR. SINCLAIR: No, I will put out the competitive rate. You asked me for some that were lower.

THE CHAIRMAN: I am asking the distinction you make between class rates, standard rates.

MR. SINCLAIR: Standard mileage class rates are the maximum. Below them are the distributing class rates.

THE CHAIRMAN: That is what you mean.

MR. SINCLAIR: And then there are the terminal class rates. Then there are the commodity rates, and there are two types: commodity mileage class rates and point to point specific commodity rates. Mr. Shepard does say that they would move all the rates up into the standard class.

THE CHAIRMAN: I see that. I just wanted to have the distinction you are making between standard rates, class rates and commodity rates. We have the three different rates.

MR. SINCLAIR: That is right.

COMMISSIONER INNIS: I suppose the next section brings that out.

MR. SINCLAIR: In principle we agree I am happy to say, with the views expressed by Mr. MacPherson on this subject at Vol. 120, p. 21671.

CLASS RATES

It seemed appropriate to me, in dealing with the various types of rates, to first deal with class rates. Class rates have been in effect since the earliest history of railways in Canada. In Eastern Canada, on the Canadian Pacific, they were influenced by the rates already in effect on the Grand Trunk, which divided traffic into four classes. In Western Canada the class rates which were first applicable on the Canadian Pacific were those put into effect on sections of the Canadian Pacific built by the Government of Canada prior to the formation of the syndicate which later formed Canadian Pacific Railway Company.

Prior to the Western Rates Case in 1914, there was a different scale of class rates in Manitoba than in Saskatchewan - Alberta. In British Columbia there was a higher scale applicable until 1949, when the Prairie scale became operative in that Province. Terminal Class Rates, which involve the use of construction mileage are operative on traffic moving between Fort William and Western Canada and between Vancouver and Western Canada. The Fort William terminal rates also apply on traffic moving between Eastern and Western Canada. There are also Competitive Class rates which are operative during the season of navigation in Eastern Canada to meet water competition. (Between Montreal and Toronto and Hamilton and intermediate ports served by C.S.L.)

The basic Class rates are the Standard Mileage Class rates. These rates require, under Section 330, prior approval of the Board before becoming operative. They form the ceiling above which no rate can go. While these rates are the maximum rates, very little traffic moves on them. The amount moving on them cannot be closely estimated until the Waybill Study has been completed by the Board of

Transport Commissioners. This study is one which the Board is conducting in connection with the General Freight Rates Investigation.

On a revenue basis, Mr. Jefferson, at p. 15749, Vol. 79, stated that: "It would be less than 5%." And on a volume basis I think the estimate is something under two per cent.

While the evidence is that very little traffic moves on the Standard Mileage Class rates they are most important as they are the foundation of the rate structure, because, first, they are approved by the Board before they go into effect; second, other rates are related to them, for example, distributing class rates in Western Canada; and third, the commodity mileage scales are also related to the standard rates. What I am saying is that standard rates are the key rates upon which many other rates are based.

THE CHAIRMAN: Would you say those rates filed under Section 330 and found by the Board must pass the test of just and reasonable?

MR. SINCLAIR: Yes, my lord.

At present the standard mileage rates are not equal throughout Canada; some standard mileage rates are higher in the East than in the West and many are higher in the West than in the East. The reason for this disparity is, in part, historical, and, in part, on account of differing circumstances and conditions. Alberta, by its proposal to amend Section 329(1) of the Railway Act, would preclude any variation in the Standard Mileage Class rates and make equalization of such rates mandatory. Canadian Pacific is opposed to this proposal and I propose to deal with it further when discussing equalization. In our submission, Section 329(1) setting out what the standard freight tariffs are to specify, should not be used as a section dealing with equalization.

Manitoba (printed brief, page 120) and Alberta (Vol. 121, p. 21912) would abolish the present standard mileage class rates. Mr. Frawley would supplant the standard mileage with a scale approximating the present distributing class rates.

THE CHAIRMAN: Are you coming back to these proposed amendments of Alberta?

MR. SINCLAIR: Yes. I am going to deal very carefully with the amendments of Alberta under equalization.

THE CHAIRMAN: All right.

MR. SINCLAIR: Mr. Frawley would supplant the standard mileage with a scale approximating the present distributing class rates. He said that the railways had made out no case for the retention of both the standard mileage and distributing class rates.

I find that hard to understand. Why should we have to make out a case for something that has been proved to be the basis of our rate structure. I thought it should be the other, and that Mr. Frawley has made out no case for the abandonment.

THE CHAIRMAN: What do you mean?

MR. SINCLAIR: I think he has made out no case to have the standard mileage and class rates removed. If there is any onus, certainly for a case to be made out, it rests on Mr. Frawley; and he has had no evidence concerning the necessity of dispensing with the standard mileage class rates.

Mr. Shepard (Vol. 118, p. 21417) is suggesting that most, if not all rates, either class or commodity, be published as standard mileage class rates and the only rates not so classified, would be competitive rates which are to be published in special tariffs, and some other minor rates, I think, such as development rates.

The standard mileage class rates are fixed - they are the maximum rates and can only be changed by an order of the Board. To classify most if not all class and commodity rates as standard class rates would be to straight-jacket the rate structure to such an extent that the railways and industry in general would be placed under a most severe handicap. I recall to you that part of our brief that deals with board approval and the evidence of one of the men in Vancouver. Our submission is that the standard class rates, the distributing class rates and the commodity rates are all necessary for flexibility in the rate structure.

The Distributing Class Rates which are covered by special tariffs, have been a matter of much discussion, particularly during your Commission's hearings in Western Canada. There is a difference between Distributing Class rates in the East and in the West.

Distributing Class Rates in the West were prescribed by the Board in the Western Rates Case in 1914, 17 C.R.C. 123, at 15% below the Standard Class rates. In the West, Distributing Class rates are only applicable from the recognized distributing points. (i.e. Recognized by the trade and the railways.)

Distributing rates in the West are admittedly not generally applicable on traffic moving into distributing centres. However, where there is an industry or a continuous movement of any commodity from other than distributing points in Western Canada, the Railways publish on such movements Special Commodity rates, equal to the Distributing Class rates.

In Eastern Canada the Distributing rates are known as Schedule A, or Town Tariff rates. These rates were prescribed in the International Rates Case in 1907 (order 3258 of July 6th, 1907). Schedule A rates are applicable

between the points named in both directions. They also apply to and from intermediate points until the Standard Mileage Class rates make lower.

I should say, at this point, that the subject of Distributing Class rates is a matter that I will deal with again when discussing Rate Equalization.

COMMODITY RATES.

The second major type of rates is Commodity Rates. These are of two kinds:

1. Commodity Mileage Rates.
2. Specific Commodity or Point to Point Rates.

On a volume or revenue basis commodity rates are the most important type of rates in the rate structure, as they move, by far, the largest proportion of traffic. Commodity rates are designed to meet particular conditions and to meet the needs of industry. They are put into effect where the traffic will not move freely under Class rates. No one has suggested that Special rates should not continue to form part of the Canadian rate structure but Manitoba proposes to strictly limit the type of rate which could be a Special Rate. Proposals have been made by Alberta as to the equalization of all Special rates and by Manitoba to include in the category of Special all competitive rates. I propose to deal with these proposals later in my argument.

I now turn to the subject of equalization.

EQUALIZATION

Our written submissions on this subject may be found in Part II, pp. 64-82. Mr. Jefferson's evidence can be found in the following volumes and pages of the transcript:-

Vol. 74, pp. 15101-02;	Vol. 76, pp. 15389-409;
Vol. 79, pp. 15768-72; pp. 15825-29;	Vol. 80, pp. 15929A-40;
Vol. 82, pp. 16249-57; pp. 16326-30;	Vol. 83, pp. 16412-22;
	Vol. 84, pp. 16535-46.

The differences in tolls between different regions and within regions are based on practical conditions of both an Operating and Traffic nature.

As I pointed out, dealing with class rates, there was at the outset a different basis for the rate structure in Western Canada as compared with Eastern Canada. The impact of water and competing rail transportation in Eastern Canada was taken into account in the Eastern Canadian class rates. This was found to be a fact by the Board in a number of cases, including the General Freight Rates Investigation of 1927, 17 J.O.R. & R. 131, Chief Commissioner McKeown at p. 136.

Throughout the history of regulation of railways in Canada, the aim of the statute, the regulatory tribunal and the railways has been towards equalization. That there were at one time fairly substantial differences is admitted.

The Board, in dealing with the complaints arising as to disparity between the east and the west, held that the disparity was justified even though they did, by giving different percentage increases and decreases between rates east and west, lessen the amount of disparity. Mr. Jefferson dealt with the effect of the Board's decisions from the Western Rates Case in 1914 down to the 8% Interim Increase Case of 1949 (Vol. 76, p. 15390). His Exhibits 171 and 172 showed the effect of these judgments on the rates in the

East, in Prairie territory and in Pacific territory. You will recall that there was a distinction between Prairie and Pacific until 1949. Exhibit 171 summarized them in this way -- that there was a percentage increase in Ontario and Quebec of 147% compared to an increase of 97% in Prairie territory and 51% in Pacific territory since 1914.

The question of a disparity in burden caused by freight rates, East vs West, has long been a matter of contention. What disparity there does exist at present, if any, can only be determined after the results are known of the waybill study now being conducted by the Board. We will then have a basis of seeing whether the burden is heavier in the east or in the west. You will recall that Manitoba in their printed brief (pp. 125-29), based on a statistical analysis and excluding grain traffic, for the year 1948, showed a disparity against the west of $6\frac{1}{4}\%$. We pointed out in our written submission (Part II, pp. 64-68) that the statistical analysis was subject to a large number of frailties and could not be accepted without considerable reservation. Those frailties were admitted by Manitoba's witnesses. However, adopting Mr. Moffat's statistical method with its weaknesses and bringing it down to June 30, 1949, and including grain, there was practically absolute equality of burden, the difference being .003% (C.P. Part II, p. 66). You will recall Exhibit 289 that was filed by Mr. Evens on May 19 brought it down to February 28, 1950, and there has been practically no change; it is now .75% instead of .003, which is insignificant in view of the figures and the statistical program. The point I wish to make is that under the present law substantial uniformity of burden has resulted. There are no doubt differences between levels of class and commodity mileage rates between the east and the west. That does not say that substantial

progress has not been made towards uniformity where uniformity is possible. On account of the basic differences in conditions at the outset and at present, uniformity in tolls is a matter that inevitably develops slowly and I submit that it is only proper that it should.

(Page 23605 follows).

The fact that further progress towards uniformity can in all likelihood be made has been recognized for some time by Canadian Pacific. In support of this I need merely to point to the fact that in the 21% Case (as stated at p. 68 of Part II of our written submission) the Railways pointed out that they would welcome a General Freight Rates Investigation after the conclusion of the revenue case. In April, 1948, the Governor in Council under the provisions of the Railway Act directed the Board, in the words of the Order -

" . . . to make a thorough investigation of the rates structure of railways and railway companies which are under the jurisdiction of parliament, with a view to the establishment of a fair and reasonable rates structure which will, under substantially similar circumstances and conditions, be equal in its application to all persons and locations, so as to permit the freest possible interchange of commodities between the various provinces and territories of Canada and the extension of Canadian trade, both foreign and domestic, having due regard to the needs of agriculture and other basic industries."

Because of differing circumstances and conditions, complete equality of tolls is not possible. This is recognized by Alberta where, at p. 10009, Volume 52, dealing with equalization, it is stated:-

"It is obvious, however, that complete uniformity cannot be realized in practice. It is important that departures from this uniformity be permitted in order to transfer the principle from a pure

theory to a practical and acceptable solution to the freight rate problem."

Mr. Darling for Alberta (Vol. 59, p. 11377), stated that equalization on a broad scale had been applied within regions. No doubt this is so, but it is equally so, and I submit that only the most biased and narrow-minded critic of the Board would deny, that the Board and Railways have made substantial progress towards equalizing tolls throughout Canada. Later, on p. 11377, Alberta admits "that equalization could be applied over the entire system by the implementation of appropriate decisions of the Board, without there being any revision of the regulating statute."

We had a frank statement from counsel for Saskatchewan in Vol. 120, page 21670. Mr. MacPherson said "while we say that exact equalization would be desirable, we quite realize how, in a practical way, it may be impossible to achieve." Mr. MacPherson did not find it desirable, I recall to you, to propose any amendment to the existing equality legislation in Section 314.

Manitoba did not propose any change to the equalization section, Section 314. You will recall, however, that it made the matter of equalization an issue in revenue cases under their proposed amendment to Section 325. Mr. Evans has dealt with that point and why we say that is not a realistic and practical way to deal with the matter. Therefore I do not propose to cover it again. The Maritimes do not suggest any amendment to Section 314. To put it bluntly the Maritimes are quite happy without equalization.

In spite of the above-mentioned statements by Alberta's witness, Mr. Frawley has proposed amendments to

Sections 314 and 329 and the addition of 329A, which permit hardly any latitude, except for competitive rates, from complete uniformity. I submit that Alberta's amendments completely overlook Mr. Darling's statement of the necessity of recognizing exceptions from uniformity so as to transfer pure theory into a practical and acceptable solution.

Section 314 as it appears at present in the Railway Act is the equalization section of the Act. It requires that tolls be equal in respect of traffic of the same description and carried in or upon the like kind of cars or conveyances over the same line or route if, and only if, "substantially similar circumstances and conditions" are present; that is, if substantially similar circumstances and conditions are not present, then equality is not required by the Act.

THE CHAIRMAN: I gather from the way you deal with that section now that the definition of the same line or route is more extensive than it would appear to be --

MR. SINCLAIR: I think that is right.

Undoubtedly lack of equality is discrimination and lack of equality under the conditions set forth in subsection 1 of 314 is unjust discrimination and is prohibited. What does Alberta propose to Section 314? They eliminate the words "under substantially similar circumstances and conditions" in subsection 1 and add the words "from the same origin to the same destination". By eliminating the words "under substantially similar circumstances and conditions" would require equality so long as the traffic was of the same description and carried in or upon the like kind of cars and conveyances and passing over the same line or route but Alberta, having thus tremendously broadened the Section then turns and most materially

restricts the present effect of the Section by the addition of the words "from the same origin to the same destination." Alberta by eliminating the words "in substantially similar circumstances and conditions" has eliminated the basis of our law against unjust discrimination. In the result Alberta would require absolute equality from the same origin to the same destination, whether or not substantially similar circumstances and conditions are present --

THE CHAIRMAN: Pardon me a moment. I do not follow you there. You talk of absolute equality from the same origin to the same destination.

MR. SINCLAIR: That is right.

THE CHAIRMAN: When Mr. Frawley was expounding that he said that all freight of the same description leaving point A to go to point B must be carried at the same rate to all shippers. That is obviously true, is it not?

MR. SINCLAIR: Yes, if it is moving under substantially similar circumstances and conditions.

THE CHAIRMAN: No. They must be the same circumstances and conditions?

MR. SINCLAIR: I am not too sure of that.

THE CHAIRMAN: He said all freight of the same description moving from point A to point B is now carried at the same rate, is it not?

MR. SINCLAIR: Yes, if it is moving under substantially similar circumstances and conditions.

THE CHAIRMAN: What do you mean there? I gave potatoes as an example.

MR. SINCLAIR: You have taken an easy one, mylord.

THE CHAIRMAN: Perhaps I have. I am feeling my way.

MR. SINCLAIR: You can get ones that are more

difficult.

THE CHAIRMAN: The same commodity?

MR. SINCLAIR: Yes.

THE CHAIRMAN: Tell me one.

MR. SINCLAIR: Most of them are taken in the classifications as to description. That is not to say, however, that they all are. For instance, let us take salt. That is taken care of, as I recall it, in the classification. For instance, salt can move in bulk or in packages. Let us say it was not taken care of in the classification. Then it would not be moving under substantially similar circumstances and conditions.

THE CHAIRMAN: Would it not still remain that anybody who brought packages of salt to you to be shipped from point A to point B would pay the same rate as any other person?

MR. SINCLAIR: Unless it was taken care of in the classification Mr. Frawley would have me moving salt, no matter how I got it, for the same amount.

THE CHAIRMAN: As what?

MR. SINCLAIR: Between two points, whether it is in packages or otherwise.

THE CHAIRMAN: Oh, I do not think so.

MR. FRAWLEY: I certainly never said that.

MR. SINCLAIR: There are a lot of things Mr. Frawley did not say. I am looking at what the legislation says.

THE CHAIRMAN: It is the same description.

MR. SINCLAIR: All right.

THE CHAIRMAN: I thought everybody had agreed -- I thought Mr. Evans was agreed -- that this was quite unnecessary.

MR. SINCLAIR: That may be. I am trying to look at the legislation.

THE CHAIRMAN: I think that unwittingly you are distorting the meaning of these words.

MR. SINCLAIR: All I know is if I get involved in a case I take a look at the legislation. I take each word of the legislation and see what I can make out of it. Knowing Mr. Frawley, and having seen him in action for a little while, having this in the Act I am trying to see what he could make out of the legislation, and if I can make it out of it certainly Mr. Frawley could, and if not Mr. Frawley somebody else. I say with the words in that legislation, and not looked after in the classification as to commodities --

THE CHAIRMAN: What good would that be to Mr. Frawley?

MR. SINCLAIR: Maybe half a cent less on 100 miles of movement in Alberta.

THE CHAIRMAN: On what?

MR. SINCLAIR: I don't know on what.

THE CHAIRMAN: I must say I never thought that was Mr. Frawley's intention.

MR. SINCLAIR: It may not be.

THE CHAIRMAN: I thought that what Mr. Frawley proposed to put into the law was already there. Otherwise there would be possible discrimination between shippers and we cannot have that.

MR. SINCLAIR: The point is he takes away the whole basis of our law as to unjust discrimination in his amendment to Section 314. I am not saying this. What I am doing with this legislation --

THE CHAIRMAN: I quite understand that the words "in substantially similar circumstances and conditions" are of great importance.

MR. SINCLAIR: Yes.

THE CHAIRMAN: However I do not think you are applying them in the proper way here.

MR. SINCLAIR: With respect, my lord, I am looking at the legislation. I am not interested in the intention of Mr. Frawley or Mr. Shepard or Mr. MacEherson. I am interested in what the legislation they have proposed says.

THE CHAIRMAN: I have not Mr. Frawley's amendment before me.

MR. SINCLAIR: I say in the result Alberta would require absolutely equality.

THE CHAIRMAN: We are discussing this amendment finally?

MR. SINCLAIR: Yes. I will proceed to go to work on Mr. Frawley's equalization sections, if I can, and Mr. Brazier's.

In the result Alberta would require absolute equality from the same origin to the same destination, whether or not substantially similar circumstances and conditions are present, but does not prohibit unjust discrimination or inequality between different origins and the same destination where the circumstances and conditions are substantially similar.

THE CHAIRMAN: Have you read the amendment?

MR. SINCLAIR: I certainly have.

THE CHAIRMAN: I have it before me now. Read what it says.

MR. SINCLAIR: "All tolls shall always, in respect of all traffic of the same description, and carried in or upon the like kind of cars or conveyances, from the same origin to the same destination, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise."

He says, "from the same origin to the same destination," and that is the only time when he will have it charged equally. There is a limitation there, "from the same origin to the same destination."

THE CHAIRMAN: Does that mean from the same point to the same point?

MR. SINCLAIR: That is right.

THE CHAIRMAN: And of the same description.

MR. SINCLAIR: That is right.

THE CHAIRMAN: Is that not the present law?

MR. SINCLAIR: Yes, my lord.

THE CHAIRMAN: I thought you were saying there was some hidden meaning, that a package of salt and salt in the bulk might be considered --

MR. SINCLAIR: It is only the present law if they are under substantially similar circumstances and conditions. If I may say so, I suggest with deference it is hard to visualize a case where they are moving between two points from the same origin to the same destination where it would not be under substantially similar circumstances and conditions when we have the same kind of cars and conveyances. I am saying, however, that it is not beyond the realm of possibility that there could be differences. By taking out those words Mr. Frawley has precluded any effect being given to those differences. He says that no matter what the circumstances are, except the same kind of cars and conveyances, if it is from the same origin to the same destination the toll must be the same.

THE CHAIRMAN: Yes, to all persons.

MR. SINCLAIR: That is right. I say as it stands today --

THE CHAIRMAN: To all persons.

MR. SINCLAIR: Quite so.

THE CHAIRMAN: They take the same description of goods and all shippers who come there must be treated equally.

MR. SINCLAIR: That is right.

THE CHAIRMAN: How can there be different conditions between shipper A and shipper B when it is on the same day?

MR. SINCLAIR: The reason why there cannot be -- Mr. Frawley says "of the same description" and then he depends on the classification for the same description. The word "description" means the rating in the classification or the description in the classification. I am suggesting that there might not be a delineation in the classification, and under those circumstances I would be able to make a difference between salt that was in packages and salt that was in the bulk.

THE CHAIRMAN: Would they be of the same description?

MR. SINCLAIR: Yes.

THE CHAIRMAN: No. It is understood that shipments by package and shipment by bulk are two different things.

MR. SINCLAIR: The only reason it is understood to be is because it is provided in the classification.

THE CHAIRMAN: Well --

COMMISSIONER ANGUS: Would different carload minima be allowed under Mr. Frawley's amendment? They might be carried in the same kind of cars.

MR. SINCLAIR: There is an example.

THE CHAIRMAN: What is that?

COMMISSIONER ANGUS: Different carload minima .

THE CHAIRMAN: Would they be of the same description?

MR. SINCLAIR: Mr. Frawley would say yes. He

would say I am shipping canned goods.

THE CHAIRMAN: What about canned goods?

MR. SINCLAIR: He says, "I am shipping canned goods in a box car. Therefore the rates must be the same from the same origin to the same destination." I say, "You are shipping canned goods in a box car but you are shipping them under different circumstances. They are not substantially similar." I say that one is 70,000 pounds and the other 30,000 pounds and therefore I have the right to charge the man who ships 30,000 pounds a higher rate per 100 pounds than the man shipping 70,000 pounds.

(Page 23615 follows)

THE CHAIRMAN: And you think the word "description" would cover that?

MR. SINCLAIR: I don't think they would.

THE CHAIRMAN: You don't think they would?

MR. SINCLAIR: No. It is arguable that is all I am saying.

COMMISSIONER INNIS: It is a little difficult to see the Board removing mountain differentials and being fussy about details of this sort.

MR. SINCLAIR: Well, of course, you have to look at every case in its true surroundings. That was an unusual case, that is all I can say it was.

One might well ask why did Alberta make these changes, and after reading the discussions during Mr. Frawley's argument I don't think it is at all clear - -

THE CHAIRMAN: Had those words "under similar circumstances and conditions" ever been defined?

MR. SINCLAIR: They have been considered in cases, yes, my lord.

THE CHAIRMAN: Have they ever got the kind of definition that you are trying to put on them now?

MR. SINCLAIR: Well, of course, you see - -

THE CHAIRMAN: Well, have they?

MR. SINCLAIR: Well, you cannot, with respect, take legislation like that. You cannot lift out of the Section that the Board was construing, certain basic words to the whole concept of it.

THE CHAIRMAN: But I have asked you, have those words ever been interpreted?

MR. SINCLAIR: Yes, for instance - -

THE CHAIRMAN: Have they ever been interpreted in the way you say now they might be interpreted?

MR. SINCLAIR: In Brant Milling Company vs.

Grand Trunk, 4 C.R.C. 259, and I am reading from the part of the judgment at page 268 - -

THE CHAIRMAN: Is this in your argument?

MR. SINCLAIR: No.

"Our Act" (says the Board, Chief Commissioner Killam) "then leaves it open" (he is dealing with these words 'under substantially similar circumstances and conditions') "to consider in reference to the making of charges, all circumstances and conditions that appear applicable, whether directly relating to the carriage or the service given by the railway company or not."

Now, I don't know where you could get a broader discretion being - -

THE CHAIRMAN: Where is that from?

MR. SINCLAIR: Brant Milling Company vs. Grand Trunk, 4 C.R.C. 259 at 267.

THE CHAIRMAN: What year was that?

MR. SINCLAIR: That would be about 1907 or 1908. This is basic, this whole law of unjust discrimination is basic to our law. It has been gone over so many times.

I have another case, Canadian Portland Cement Company vs. Grand Trunk, which is also an old case 9 C.R.C. 209. Mr. Commissioner McLean at p. 210 said this:-

"No doubt the coal of which from 40 to 45 thousand tons per annum are consumed, does constitute an important factor in the cost. This phase of the application is in reality a plea that Section 315, the 'equality clause, should be used to bring about an equalization of costs of production. This

clause is, however, concerned with traffic conditions, and allegations regarding 'similar factories' are of no value unless the 'similar factories' are under similar circumstances and conditions of traffic, accorded more favourable terms."

Then in the Michigan Sugar Company vs. Chatham W. & L. E. Railway Co. 11 C.R.C. 353, Mr. Commissioner McLean at 361 says this:-

"The phrase 'under substantially similar circumstances and conditions' is a wide phrase and the illustrative items contained in the section do not necessarily, in my opinion, exhaust the scope of what the Board is empowered to consider".

That is going to the description of like kinds of cars and conveyances.

Now, I say, one might well ask why did Alberta make these changes (because they are certainly radical changes) and after reading the discussion during Mr. Frawley's argument I don't think he made it at all clear as to whether he wanted them, so I tried to figure it out again.

THE CHAIRMAN: That is what we were trying to get Mr. Frawley to tell us.

MR. SINCLAIR: I have tried to develop it in my own way to see if I am right. I suggest that what may have been in the mind of Alberta's draftsman was that, having provided for mandatory equality in Sections 329 and 329A, it was no longer necessary to prohibit unjust discrimination because under Sections 329 and 329A there would be a prohibition against any inequality whatever. Alberta would not have needed to retain any part of subsection 1

of 314 in view of its Sections 329 and 329A except that there is a limiting effect in Section 314(1) which is that traffic must be carried in or upon the like kind of cars or conveyances and it must pass over the same line or route. For that reason, Mr. Frawley has to hold on to something in 314.

Mr. Frawley has not changed subsection 2 of 314 but he has very materially altered its effect because "such tolls" in that subsection refer back to the tolls dealt with in subsection 1. Mr. Frawley has retained subsection 314(3) as it is now in the Act but for some reason which Mr. Frawley did not explain he has retained in this subsection the words "under substantially similar circumstances" which he eliminated from subsection 1. Mr. Frawley has also retained 314(4) and I suggest it points up the fact that he has not entirely lost track of the present concept of unjust discrimination when it comes to equality between localities. What he has done is to retain in regard to localities a concept which he does not retain in regard to individuals. Mr. Frawley has attempted to make Section 314 a discrimination section in no way connected with the matter of equality. His equality proposals are transferred and most materially extended by the amendments to Section 329 and the addition of Section 329A. Section 329(1) as proposed would make mandatory the equalization of the standard mileage class rates.

THE CHAIRMAN: Just a moment, where are you now? You are referring to 329A as it appears in your consolidation at page 23?

MR. SINCLAIR: It is 329(1) as Mr. Frawley - -

THE CHAIRMAN: 329(1), I beg your pardon.

MR. SINCLAIR: Yes, as Mr. Frawley has amended it. It is shown at page 22 of our consolidation. It says,

as he has amended it:-

"The standard freight tariff shall specify the maximum mileage tolls to be charged for each class of the freight classification for all distances covered by the company's railway and such tolls....."

(he added these words)

".....shall be the same for the same distances and the same tolls shall be charged by all companies."

Now, the way the Act read before, there might be more than one standard tariff. He has made it mandatory that there should be only one.

Subsection 2, which is unchanged, would permit distances to be expressed in blocks or groups. A similar exception from equalization is made by Mr. Frawley in his proposed Section 329A (2).

I might at this stage recall to you Dr. Angus' discussion with Mr. Frawley at Vol. 122, pp. 22004 et seq. Dr. Angus' question was whether, if the result of the application for relief under the Long-and-Short-Haul Clause having been denied and the competitive rate being blanketed back as a maximum to intermediate points, would not that be a violation of Mr. Frawley's equality provisions (that is the question Dr. Angus put to Mr. Frawley). Mr. Frawley's answer was that the blanket would in effect be a group within subsection 2 of Section 329 and 329A as proposed. This of course, is not at all correct. The reason for the grouping or blanketing subsections is that within the territory affected by the group, rates may be blanketed notwithstanding that the same rate is applied to different mileages. The blanketing back of a transcontinental competitive rate to, say, Calgary would and could become the measure of the

rates for equal distances whether they were intermediate to a transcontinental haul or not.

In 329A Mr. Frawley provides for mandatory equalization of special rates which would include not only commodity mileage rates but point-to-point commodity rates for the same description of traffic for the same mileages, subject only to distinctions based on the nature and use of the commodity (Section 329A (2) and certain development rates. I think Mr. Frawley's proposals as set out in Sections 314, 329 and 329A may be summarized in this way -- except for competitive rates he is to have mandatory equalization of the standard rates and special rates with minor exceptions and therefore it is not necessary to him that "substantially similar circumstances and conditions" exist. Alberta proposes to have equality absolute and complete and not the practical equality which I submit is to be found in the equalization proposals of the Canadian Pacific.

Mr. Brazier during his argument (Vol. 123, pp. 22194 et seq) gave his views on equalization. He said "that all rates and tolls in Canada should be equal wherever this is possible". He then went on to amend Section 314 by striking out "under substantially similar circumstances and conditions" and "passing over the same line or route." That was an amazing thing to do, because what he was going to do (and I have told this to Mr. Brazier and I am sorry he is not here) was to make the rate on the Yukon and White Pass Railway the same on the Canadian Pacific. If Mr. Brazier's intention was to have the measure of the class rates on the Yukon and White Pass as the measure that was to apply on the Canadian Pacific, then certainly he has taken a step forward in the realization that rates must go up, that is all I can say. I don't think Mr. Brazier really realized what his proposed amendments

resulted in. What Mr. Brazier proposed is even more far reaching than what is suggested by Mr. Frawley (and that, I suggest is something) although he might very well be surprised that this is so. Mr. Brazier with a wave of the hand has wiped out not only the basis of our unjust discrimination law but has made it mandatory to equalize tolls whether or not they are moving over the same line of railway or over the same route. What Mr. Brazier proposes, I submit, can be summed up in this way -- equalization for equalization's sake -- equalization irrespective of difference in traffic and operating conditions -- equalization whether the present differences in rates are causing loss or detriment or otherwise. I suggest that what Mr. Brazier is proposing is -- I don't like the word "irresponsible" but it is pure fancy or very close to it.

I would ask you to turn your mind to what the Board has said, and I have two cases. Consumer's Glass vs. C.F.S., 1931, 38 C.R.C. p. 77, and the extract that I want to read is at the top of page 89. There the Board says this:-

"The whole rate structure is honeycombed with rates that are an exception to any principle of equality in arranging for a similar transportation service. This condition has always existed, has been recognized and approved by all rate regulating tribunals, and is not contrary to law. Without such conditions, the business of the country could not develop and flourish. These variations in rates are necessary to develop traffic, to enable its free movement, and to meet market, water and rail competition."

Now, I suggest that my friends who have proposed this mandatory equality, may have done well to have given great weight to the statement that was made by some eminent counsel who have appeared from their provinces in the past. I refer to the very famous remarks of Mr. Symington when he was acting for Manitoba and Saskatchewan in the 1922 Reduction Case which is reported at 27 C.R.C. 153, and the extract I shall read commences at the bottom of 171 and continues over to the top of 172. This is what I wish to draw your attention to:-

"Counsel" (that is Mr. Symington) "for the Provinces of Manitoba and Saskatchewan very frankly and fairly stated" (this is what the Board is saying and they are quoting Mr. Symington) 'I have never, at any time, said otherwise than that I did not think that of necessity the rate for the same distance for the same commodity should necessarily be the same East as West or West as East. In my opinion, the equal treatment of unequal things is just as bad as the unequal treatment of equal things. I have never advised, either in argument before this Board, or before any other tribunal, or by evidence adduced, anything that would lend itself to the suggestion that I have advocated that any particular rate must of necessity be the same for any particular distance East as West. There are many other factors besides distance!'"

I say that there is a practical and an experienced counsel acting for these Western Provinces who has recognized a fundamental and basic fact.

THE CHAIRMAN: All right, we will take a few minutes.

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MR. COVERT: Mr. Chairman, just before Mr. Sinclair starts, I wanted to read into the record a telegram that I received this morning from Mr. J. W. Stewart, Manager of the Maritime Division, Canadian Manufacturers Association. It reads:-

"I am authorized by the Executive Committee of the New Brunswick Branch, Maritime Division, Canadian Manufacturers Association, to submit the following STOP During presentation of New Brunswick case respecting extension of Maritime Freight Rates Act to eastbound shipments, Volume 22 of evidence, page 4179, reference was made to this Association STOP We wish to have it placed on record that this reference was not correct STOP The New Brunswick proposal has never been placed before, nore discussed at, any meeting of the New Brunswick branch STOP

(Signed) J. W. Stewart, Manager
Maritime Division
Canadian Manufacturers Association."

The telegram is dated May 22, 1950.

Now, I have looked up the record at that point, and it was Mr. Love who was being cross-examined by Mr. O'Donnell, and they were discussing the question of the extension of the Maritime Freight Rates Act so that it work both easterly and westerly. Mr. O'Donnell asked him if the New Brunswick manufacturers had indicated

no fear of that, and then Mr. Love said:-

"The matter was discussed at a committee meeting in St. John representing the Maritime Branch, Canadian Manufacturers Association.

"Q. You do not know what their view is?

"A. They had no objection to that."

Now, that is what Mr. Stewart obviously refers to.

Now, Mr. Barry, you will recall, was asked on May 15 about that, and I think it should be said, in fairness to him, that it is in Vol. 126 at pp. 22701. He was asked about the situation as to whether or not manufacturers objected, and he said:-

"We investigated it, had many discussions and much consideration was given to it, and there was no objection made in the Province of New Brunswick to it by anybody."

And you asked, Mr. Chairman:-

"That is, there are no manufacturers down there who feel that they will suffer by giving these low rates to manufacturers coming in from Central Canada?"

And Mr. Barry said:-

"As to that question, I would not want to categorically say that there are none, but I will say that there are none who advised us of it, and much publicity was given to it, and it was discussed with many. I know of no manufacturer who expressed any objection to it whatever."

Now, it seems to me that perhaps we are no further ahead, but I thought that, in view of the fact that this matter has been discussed, it would be advisable to put it on the record, and then in the reply perhaps it may be cleared up.

THE CHAIRMAN: Mr. Barry will be advised?

MR COVERT: Yes; he gets the transcript.

MR SINCLAIR: I am at the middle of page 44 of my notes, my lord:

I now turn to Canadian Pacific's proposal on equalization. As stated in our written submission, our studies on equalization are not yet complete but we did state at pp. 69-75, Vol. II of our written submission and also during Mr. Jefferson's evidence, (transcript, Vol. 76, pp. 15396 to 15403) the outline of our proposal for equalization. The Canadian Pacific proposal may be summarized in this way -- we propose a pattern applicable throughout Canada for equalized class rates and commodity mileage scales and special commodity rates directly related to the mileage scales. I wish to emphasize no amendment to Section 314 is necessary to carry out our proposal. All that would be required is an amendment to Section 325 and to the Maritime Freight Rates Act, section 3(2)(c).

THE CHAIRMAN: Have you prepared an amendment?

MR SINCLAIR: Well, that is one we have discussed quite a bit, my lord. The amendment I have reference to there is in connection with grain, Crow's Nest, and the other one is one I will discuss a little more fully later.

There are at present four standard mileage tariffs which have been approved by the Board. Differing standard tariffs are permitted under Section 329(1) of the Act. Generally speaking, the Ontario-Quebec scale, which is

operative between all points Windsor, Sudbury and Sault Ste. Marie and east, is the lowest except in the Maritimes on traffic movements to which the 20% reduction from the normal toll is applicable. The scale operative between Sudbury and Fort William is the highest; and the scale operative from Fort William to the Pacific Coast is, generally speaking, higher than the Ontario-Quebec scale but lower than the Superior scale.

It is the view of our Traffic officers, however, that operating, traffic and competitive conditions must be reflected in the rate structure and any attempt to equalize rates and not give some effect to differing operating, traffic and competitive factors would, I submit, be unrealistic. Canadian Pacific is of the view that the differing operating, traffic and competitive factors should be reflected in the specific commodity rates and in the competitive rates. That is why we are able to propose equalization of the class scales and the commodity mileage rates.

Under the Canadian Pacific pattern for equalization, as has been stated, the standard mileage tariffs would be equalized by averaging the first class rates in the Ontario-Quebec and Prairie-Pacific standard scales and then establishing a relationship between the classes. Following this, an appropriate rate of taper must be worked out.

As to equalizing distributing class rates, the proposal is to make percentage reductions from the equalized standard mileage rates. It is proposed to maintain the same percentage relationship in the distributing class rates between the classes as would be found in the standard mileage rates. The reduction proposed is 10% from first class for distances up to 200 miles and 15% from first class for distances over 200 miles. The rate of taper would be the same

as that applied to the new equalized standard mileage rates.

Under the Canadian Pacific equalization plan or proposal the distributing class rate would be equalized throughout Canada so that the many complaints about the distributing class rates in Western Canada and the alleged hardship that these now cause, as compared to Schedule A or Town Tariff rates, will disappear.

Considerable traffic moves between Eastern and Western Canada on through class rates. These through rates were constructed on basing arbitraries to Fort William and terminal rates beyond. The basing arbitrary factor in the through rates is blanketed as a maximum over all points between Montreal and Fort William. The equalization proposal of Canadian Pacific will necessitate adjustment in through class rates between Eastern and Western Canada, because both the factors which make up the through rate will need to be revised. A new rate group to be called the Northern Ontario rate group will likely be proposed. This is because, if a new rate group in Northern Ontario were not established, combinations of intermediates might result in defeating the through rate from certain locations which are now part of Groups A and B.

Canadian Pacific believes that it can work out a pattern to equalize commodity mileage rates and such specific commodity rates as are directly related to the commodity mileage rates. The Traffic officers of the Company, after intensive consideration, have found that the indications are as stated at p. 74 of Part II -- I checked to see if there was any change -- "the most satisfactory method of constructing equalized commodity mileage scales will result from basing them on percentages of the proposed uniform standard mileage rates".

I submit that the complexity of the problems which equalizing rates brings forth clearly demonstrates the necessity of leaving wide discretion in the matter with the Board. I wish to stress as emphatically as I can that the rigidities implicit in a mandatory statutory direction regarding equalization as set out in the proposed Provincial amendments, -- that is, Alberta and British Columbia -- will deter equalization and will, I submit, unduly dislocate industry and adversely affect railway revenues needlessly. In support of that I have quoted you from counsel who in former years appeared for the Western Provinces.

In Volume 76, p. 15396, Mr. Jefferson, in dealing with how far equalization could be carried out, drew attention to the fact that the Maritime Freight Rates Act would require amendment.

During Mr. Covert's examination of Mr. Jefferson the necessity of amendment to the Maritime Freight Rates Act, if equalization was to be made effective, again arose (Vol. 84, p. 16535), and Mr. Evans agreed to draft a proposed amendment to the Act. The draft amendment we proposed was placed in the record in Vol. 85, p. 16590.

THE CHAIRMAN: Is that in your consolidation?

MR SINCLAIR: In the consolidation of the Maritime Freight Rates Act, page 2.

THE CHAIRMAN: What page is it on?

MR SINCLAIR: It is quoted right here, and it is in our consolidation of the Maritime Freight Rates Act, page 2.

THE CHAIRMAN: I mean your consolidation of the proposed amendments.

MR SINCLAIR: Well, one is of the Railway Act and the other is of the Maritime Freight Rates Act.

THE CHAIRMAN: Oh, yes, it is divided into two.

MR. SINCLAIR: The amendment we propose would result in Section 3 (2) (C) of the Maritime Freight Rates Act reading as follows:-

"adjust or vary such substituted tolls or rates from time to time as may, in the opinion of the Board, be necessary to give effect to any general readjustment of rates in Canada or as new industrial or traffic conditions arise, but always in conformity with the intent of this Act as expressed in Sections 7 and 8 and other relative sections hereof."

I may say that I have underlined the words we have added to Section 3(2) (C).

Now, the reason we need an amendment is because of subsection (b), which provides that the reduced tolls to be maintained under this Act must be maintained except that, as the Act now provides, the Board may allow increases or reductions to meet increases or reductions in cost of operation. Well, here would be a necessity for increases and reductions, caused not by differences in cost of operation but caused by putting in an equalized pattern, and there is no provision, I submit, in the Act to enable that to be done at the present time. Certainly we would have a great deal of difficulty arguing it without having some such amendment as we propose to subsection (c) of Section 3(2) of the Maritime Freight Rates Act.

Mr. Jefferson, at page 15397, Volume 76, also stated that "equalization would not be true equalization unless the so-called Crow's Nest Pass grain rates were allowed to find their proper level under the jurisdiction of the Board of Transport Commissioners". If our proposals in regard to Crow's Nest rates find favour with

your Commission and your recommendations in regard thereto are carried into effect by Parliament, any difficulty regarding Crow's Nest rates in a plan of equalization will disappear. If, on the other hand, the present method of dealing with Crow's Nest rates continues, this fact will have to be reflected in any equalization scheme, -- and I think I would like to stress this -- although in doing so there would be a detrimental effect on the rate structure in the West. It is interesting to note that Manitoba (Vol. 118, p. 21427) is prepared to accept this result. They are prepared to accept a detrimental effect on the rate structure in the West.

Mr. Jefferson, at page 15397, mentioned the terminal rates in any pattern of equalization. I submit it is very clear that the constructive mileage contained in the Fort William and Vancouver terminal class rates must be eliminated. That is to say, true equalization between East and West cannot fail to take into account the artificial concept of constructive mileage.

Now, in regard to that Crow's Nest rate and the admission of Manitoba, the position they adopted I think is indicative that here is a provincial government who said that they are prepared to have ^{that} come about. At the same time they are continually crying about disparity, and I think that they ^{are} crying about disparity because they think it is not justified, but at the same time what would the people who pay the freight say, the shippers and consignees, to having a reflection, a detrimental reflection, in their rate structure because of this Crow's Nest Pass agreement?

These difficulties of bringing about true equalization are important because they further indicate how essential it is to leave to the Board discretionary powers in regard to equalization and the necessity

of considering similar circumstances and conditions. I submit that these considerations in themselves preclude any mandatory statutory direction as to equalization as proposed by Alberta and others.

Mr. Jefferson under examination by Mr. Covert, in Volume 83, page 16418, said:

"I do not think we will ever have what you could term complete equalization, without dislocation of industry. But you can have equalization of certain things. I do not think you can have equalization of everything."

Canadian Pacific does not believe that it is possible to equalize either special commodity rates not directly related to mileage rates or competitive rates. As far as I know, no one has contended that competitive rates should be equalized.

Specific commodity rates not directly related to mileage scales, reflect factors and circumstances peculiar to specific commodity movements. As an example of this, I would remind your Commission of the proposal of Canadian Pacific in regard to grain rates in Western Canada, if those rates were under the jurisdiction of the Board. Our proposal was to let these rates be specific commodity rates which would enable the Board to give weight to all relevant factors connected with the specific movement.

In dealing with point to point or specific commodity rates, I would like to refer to our written submission at page 75 of Part II, where we say:-

"Because of the large number of these rates and the fact that they reflect not only local conditions but also reflect the needs of local industries it is not, in the opinion of Canadian Pacific, practicable to attempt to equalize

these rates with the exception of those that are related to the commodity mileage scales.

"The Province of Alberta suggests a means of equalizing these rates by taking the lowest rate affecting a particular commodity as the basis for the equalization. No equalization can, in the opinion of Canadian Pacific, be accomplished on such a basis without great disturbance to industry as a whole and without a serious effect on the revenue of the railways."

Mr. Frawley, in his argument, Volume 121, pp. 21878, et seq. apparently misunderstood Mr. Jefferson's evidence which he therein referred to. Mr. Frawley tried to show there was a conflict between Mr. Jefferson's evidence and the statement from our written submission I have just read. I say this is not so. Mr. Frawley asked Mr. Jefferson if he knew of any development rates in Western Canada which were different for equal mileages. Note the language of Mr. Frawley's question. If he had asked Mr. Jefferson if he knew of any specific commodity rates within Western Canada that had been put in to enable traffic to move the answer would have been "certainly, hundreds of them."

I submit that a reading of all Mr. Jefferson's evidence during his cross-examination by Mr. Frawley in Volume 80 commencing at page 15916, clearly shows that Mr. Jefferson told Mr. Frawley within Western Canada he could not think of a specific commodity rate which was given to one industry to the exclusion of another, but when Mr. Frawley tried to take the whole of Canada Mr. Jefferson pointed out, for example, there was a different rate on pulpwood in Eastern Canada than within Western Canada. I may say the Western rate is lower.

If an industry wants a specific commodity rate where the costs of movements are lower because of direction or density of traffic or other operating costs and the traffic could not move at the rate that was in effect in some other region and if the two industries were not competing in a common market, the railways would give a lower specific commodity rate to one industry than to another so as to get the traffic moving and to get revenue. An example of this is the sugar beet rates in Alberta, which rates are lower in Alberta than in Ontario.

The Ontario people objected and took it to the Board, and the Board upheld the position of the Railways, that the rate was needed in Alberta to move the traffic and the traffic could move at a higher rate in Ontario. Mr. Frawley would prevent such things happening. I wonder what the sugar beet people of Alberta would say to that.

I submit the equalization proposals of Manitoba, Alberta and British Columbia are unsound and, if enacted, would result in undue complexity and industrial dislocation and unnecessarily introduce rigidities into the rate structure. Our views on the equalization method of Alberta and the reason why we cannot support it are set forth at page 79, Part II.

Mr. Jefferson, at Vol. 76, pp. 15407-8, when asked whether he agreed with Alberta's proposed method of equalization, said:

"Frankly no, sir, absolutely no. I have already given my views on these subjects. It would, in my opinion, be most improper to always adopt the lowest. In my experience, if this is done, the railways would have great difficulty in adjusting the rate

structure as a whole in an upward manner to preserve the revenues of the railways. In fact, if this was attempted, it is more than likely that it would be opposed. As stated at p. 79, this would be an unduly complicated method to pursue."

I submit it may fairly be stated that Alberta's proposals on equalization have gone to the lengths they have because of their views as to what discrimination should be prohibited by statute. Alberta apparently believes that different principles should govern personal discrimination and regional discrimination. Under the Act and the jurisprudence of the Board, discrimination is lawful unless it results in detriment. Alberta apparently believes that it is possible to prove detriment under personal discrimination but it is impossible to prove such detriment in regional discrimination. Mr. Darling (Vol. 58, p. 11121) stated:- "With respect to personal discrimination it may be stated that the Act has fulfilled its purpose"; and further stated that "personal discrimination is no longer a serious problem".

I submit that any discrimination which is to be prohibited by statute should not be able to be proved by statistical analysis or a theoretical approach to the rate structure, unrelated to proof of detriment. The making of freight rates is a very practical matter. Theory and statistics are aids in rate-making but essentially rate-making is an art and not a precise science. The problems of any region actually get down to the problems of people living and doing business in the locality. If a shipper or consignee in a locality is being harmed, that is a matter for proof. The mere fact that a rate is higher on a given commodity for a

given distance in one section of the country as compared to another section of the country, does not in any way, I submit, show that the complainant has suffered any harm. If differences are justified under the existing law, the difference in rates requires no further justification. If it cannot be shown that there are conditions justifying the difference, the shipper or consignee is protected in two ways: under the discrimination sections of the Act, if detriment is shown the lower rate must be removed or the higher rate reduced; if unjust discrimination cannot be shown, the shipper or consignee paying the higher rate can complain to the Board on the basis that the higher rate is unreasonable and refer to the lower rate as a factor that must be given weight in determining the reasonableness or otherwise of the higher rate.

THE CHAIRMAN: Just there, you say that you are leaving aside the question of increasing the lowerrate; then you drive the applicant to go to the Board to have them find that the rate charged is unreasonable.

MR. SINCLAIR: Yes. I am saying, for instance, my lord, this: I have the two bases. First he says that he is suffering harm, that he is being unjustly discriminated against, and he cannot show that he suffers any detriment.

THE CHAIRMAN: He is in the same position as all other shippers; there is no discrimination of an unjust kind against him. Then he walks to the Board and he says, "My rate is too high, therefore it is unjust and unreasonable."

MR. SINCLAIR: "My rate is too high, therefore it is unjust and unreasonable," and one of the factors is, as we have put on the record in dealing with the meaning of

"just and reasonable", what does the traffic move, similar traffic under similar conditions, in other sections of the country? And he would then say to the Board, "Here is a rate between A and B in Eastern Canada of 50 cents. Now, that is a reasonable rate in Eastern Canada; why should the rate be higher in Western Canada?" Then the onus is upon us to explain why we have this difference in rates.

THE CHAIRMAN: Then you would show your different conditions and circumstances.

MR. SINCLAIR: That is right; and I say that that completely justifies it. I say that I would not maybe have to show different circumstances in the sense of unjust discrimination; I would say --

THE CHAIRMAN: No, no; you put that aside.

MR. SINCLAIR: I put that aside.

THE CHAIRMAN: We have now, then, the case of a man against whom it cannot be said that there is unjust discrimination.

MR. SINCLAIR: That is right; that is the distinction I wish to make.

THE CHAIRMAN: He is paying a higher rate for a certain mileage for a certain description of goods than somebody else is paying in another part of the country, maybe, for the same mileage and the same description of goods. Then what is your answer?

MR. SINCLAIR: My answer is -- let us take the example of sugar beets. -- the reason I have a lower rate in Alberta than I have in Ontario is that that lower rate is necessary in Alberta to move the sugar beets, and it is not necessary to move the sugar beets in Ontario. Therefore I say to the man in Ontario --

THE CHAIRMAN: What do you mean by necessary to

move them? Otherwise they would not be moved at all?

MR. SINCLAIR: Or in the same volume.

THE CHAIRMAN: In the same volume?

MR. SINCLAIR: Yes. Now --

THE CHAIRMAN: That is, then, you must lower your rates in order to get the traffic.

MR. SINCLAIR: That is right -- to make it move freely, my lord.

THE CHAIRMAN: Well, yes, but in order to secure the traffic in Alberta you must ^{give} lower rates than you are giving in Eastern Canada, where you will not get the traffic anyhow.

MR. SINCLAIR: Yes.

THE CHAIRMAN: Is not that, then, the use you are making of the dissimilar conditions and circumstances?

MR. SINCLAIR: Well, I say, my lord, that when you are looking at the reasonableness, the justness and reasonableness, of rates, you will recall that there are many factors you look at. One of the factors is, what does the traffic move in other sections or regions of the country for similar mileage? That is one thing you look at.

THE CHAIRMAN: I know, but then it should move at the same rates in all parts of the country, if it were not for the dissimilarity of conditions and circumstances. Isn't that so?

MR. SINCLAIR: That is right -- traffic and operating conditions.

THE CHAIRMAN: Well, that would be the answer to this man, then.

MR. SINCLAIR: That is right.

THE CHAIRMAN: That the reason why somebody else somewhere else is getting a lower rate is because conditions

are not similar.

MR. SINCLAIR: That is right.

THE CHAIRMAN: Or circumstances; that is the only thing?

MR. SINCLAIR: That is right.

COMMISSIONER INNIS: Is not one of the difficulties, following this term "substantially similar circumstances and conditions", that it makes it possible for the railways to exploit the complexity of rates, and a shipper who presents himself to the Board finds himself completely powerless, completely helpless, as far as being able to answer proposals which are put forward by experts, by counsel, and so on?

MR. SINCLAIR: Well, Dr. Innis, I don't know. I have heard a lot about the complexities of rates, but they are not that difficult, that a little work won't make them pretty clear. I mean, they have a pattern. Once you put your mind to it you can see that pattern. Now, there are exceptions that may be sometimes cloud the pattern, but, after all, I never feel sorry for a man who gets in the witness box about his own business in the hands of counsel, because my experience, sitting as a junior and watching my seniors operate, is that the man in the witness box always has a tremendous advantage. He knows his own business much better than I will ever be able to learn it, much better than a man who is advising me, who has to look at the whole mass of things. As to this idea about being sorry for a man who is coming up against the counsel, because the counsel has had some experience at being on his feet, I would just say it doesn't work out. The man who runs a business knows more about his business and knows more about the difficulties that his business is facing than all

the counsel that ever stepped up before a bar.

THE CHAIRMAN: Be careful; you might be arguing counsel out of cases.

MR. SINCLAIR: Well, I have to be careful.

THE CHAIRMAN: Now, just to make sure, at the end of this last paragraph of yours on page 51 you say the shipper comes before the Board and says, "My rate is too high."

MR. SINCLAIR: Yes.

THE CHAIRMAN: And he points to another rate which is lower; then the onus comes onto the railway to show why it is higher.

MR. SINCLAIR: Yes, the Board makes us pick it up.

THE CHAIRMAN: All right, go on.

MR. SINCLAIR: In dealing with discrimination, regional discrimination, where it produces detriment, is now prohibited under the Act. It is, I submit, clearly unnecessary to go further, particularly since Canadian Pacific has proposed that rate scales as such should be equalized.

THE CHAIRMAN: Pardon me a moment. Before we leave this man against whom there is no discrimination, would you not have to justify only that there is a dissimilarity of conditions and circumstances?

MR. SINCLAIR: That is right.

THE CHAIRMAN: Also justify that the margin of difference is not too great?

MR. SINCLAIR: Well, yes, I would have to show that there was some --

THE CHAIRMAN: You have to show that the difference you are charging is a reasonable one.

MR. SINCLAIR: That is right.

THE CHAIRMAN: Just and reasonable under the circumstances.

MR. SINCLAIR: Quite; definitely, sir.

THE CHAIRMAN: All right.

MR. SINCLAIR: I submit it is abundantly clear that the proposed amendments of Manitoba, -- which are in a separate category; I am not going to include them to the same degree here; Mr. Evans has dealt with them -- the proposed amendments of Alberta and British Columbia on the subject of equalization cannot be given effect to if an equitable rate structure is to be provided in Canada and if low cost, efficient transportation service is to be provided by Canadian Railways.

Now I have some remarks, my lord and members of the Commission, on Arbitraries. They are a rate device. They have been, I think, possibly, a little confused by some of the evidence and by not drawing a proper distinction between an arbitrary and a differential, but I have developed that in my notes, and I do not think that I need to discuss them with you just now, because I have not too much time. That section will be taken into the record.

ARBITRARIES

During the course of the proceedings there has been some evidence and discussion concerning two rate-making devices, one known as Arbitraries and the other Rate Groupings, or Blanket rates.

Mr. Matheson, on behalf of the Maritime Transportation Commission, and also New Brunswick, spent some time on what are termed the arbitraries over Montreal on traffic moving, both export and domestic, to and from points in the Provinces. An important use of arbitraries in the correct rate-making sense is found in the construction of rates on traffic moving between

Eastern and Western Canada. Rates on traffic moving from Eastern Canada, for example, are made on the basing arbitraries to Fort William, plus the applicable class or commodity rates beyond. Although this is the way the rates are constructed, the rates are published as through rates.

I might say that there has apparently been some confusion in distinguishing between arbitraries and differentials. An arbitrary is merely a convenient way of making rates instead of using a mileage calculation. Most often it is merely a factor in a through rate and is not in any way related to any other rate, though it must be added to another factor or factors to obtain a through rate.

A Differential, on the other hand, has a fixed relationship to another rate and arises from the necessity of maintaining relationship to that other rate for various reasons. The best example, I think, of differentials is the Port differential, or relationship between the Canadian and United States Atlantic ports such as Philadelphia, Baltimore, New York, etc. and Montreal, Saint John and Halifax. Another well known example of a differential is in connection with the Lake and Rail Rates. In this instance the Lake and Rail Rates are maintained on a fixed differential below the All Rail Rates.

Arbitraries, being a convenient way of making rates and used instead of a mileage calculation must, by their very basis, fluctuate by reflecting increases and decreases in the through rates. They cannot be a permanently fixed amount. Differentials, on the other hand, do not reflect increases and decreases in the general level of rates but must maintain their spread with the rates to which they are related. The preservation of

fixed differentials is recognized in general increase cases, for example, p. 88 21% Case print, p. 31 8% Case print, p. 19 16% Case print.

The submission of the Maritime Transportation Commission puts forth the proposition that arbitraries over Montreal should not be increased along with the general level of rate adjustments, because they disturb the relationship which existed between Montreal and Maritime points. (Volume 39, p. 7387). There was never a fixed relationship between Montreal and Maritime points. The through rates between stations west of Montreal and the Maritimes were originally constructed by adding low arbitraries to the rates to or from Montreal; (after they had been thus constructed they became one factor through rates). In all of the General Rates Cases since 1917 the through rates, that is, including the spread over Montreal, were increased and reduced along with all other rates in accordance with the various orders of the Board, because arbitraries or, as they are sometimes called, proportionals are merely part of a rate. To do otherwise than increase the through rates, the factor East of Montreal would never bear any share of the increase. Mr. Jefferson's views will be found in Vol. 84, pp. 16548-9. This would result in a fixed relationship between Montreal and Maritime points and fixed relationships only arise in differentials and have no application to arbitraries, any more than they have to single factor rates. I think it would be of interest to the Commission to know that in the United States where there are numerous arbitraries, increases are applied to the arbitraries where they are a factor in the through rate or published separately as an arbitrary.

To treat an arbitrary as a differential instead

of what it really is would seriously disturb the existing rate structure and would result in the Railways constructing the rates on through mileage.

The arbitraries over Montreal to Maritime points have been dealt with on a number of occasions by the Board. They have never been considered as a fixed amount over Montreal and I submit there is no justification for such treatment. In the 1922 Reduction Case, 12 J.O.R. & R. 78 the Board stated referring to the Maritime arbitraries:

"These arbitraries were, of course, advanced along with all other rates, arbitraries, or proportionals under the various subsequent rate changes."

(Page 23645 follows)

Then also I think the same thing applies to rate groups or blanket rates. Rate groupings or blanket rates are another rate-making device. They are used in all jurisdictions where there are regulated rates. There are very many cases of them in the United States. In my notes here I have gathered together some views in connection with them, and I would ask that they be taken into the record.

RATE GROUPS OR BLANKET RATES

The other device to which I would like to refer is Rate Groupings, or Blanket rates.

A practical rate structure must be based on the use of rate groups or otherwise have rates for each mile. All class rates and commodity mileage rates are based on groups ranging from 5 miles in the shorter distances to 50 miles in the longer distances. The Railway Act by Section 329 (2) provides for rate groups in the standard mileage class rates and this pattern is carried over to other rates constructed on mileage.

The principle of a rate group is that the rate in the group reflects the average mileage of traffic movement from all points in the group and as a result shippers furthest from the destinations pay something less and shippers closer to the destinations pay something more.

Rate groups or blanket rates covering a larger area than the maximum of 50 miles in the general pattern are used when required to meet competitive conditions or to equalize the rates of competing localities within a given area. The largest rate groups are those known as Groups "A" and "B" which blanket the whole territory in Eastern Canada from Windsor, Sault Ste. Marie, Sudbury and East to Montreal in connection with rates between Eastern Canada and Western Canada.

These groups came into being because of water and rail competition and have been in effect ever since the completion of the Canadian Pacific Railway. This fact has, as far as I know, never been disputed and is stated in a number of the Board's judgments and I also noted that it was accepted at p. 113 of Mr. R.A.C. Henry's study on freight rates prepared for the Rowell-Sirois Commission. The blanket rate groups in Eastern Canada were dealt with by the Board in the 1922 Case and again in the General Freight Rates Investigation, 1925. The Board, in the 1925 Case, in Volume 17, J.O.R. & R. at p. 341, stated as follows:-

"The blanketing of a territory extending for 500 miles west of Montreal is above referred to. This situation was reviewed by the Board in re Freight Tolls, 1922, Vol. XII, Board's printed Judgments, Orders, Regulations and Rulings, p. 61, and at p. 69 the Board stated:-

'With reference to rates between Eastern Canada and points west of Fort William, a different situation is found to exist. Instead of territorial groupings in Ontario, as in the case of the rates between Ontario and the Maritime Provinces, the rates are blanketed to and from the whole territory Montreal to Windsor and Sarnia, inclusive, Sudbury to Niagara Falls, all intermediate points and all lateral lines. The reason is apparent -- the water lines operate from Montreal, calling at intermediate points to Sarnia, at a common rate to the head of the lakes, while the western-most points, such as Sarnia and Windsor, can reach St. Paul and thence Western Canadian points with a short mileage via Chicago. From and to points east of Montreal it has been the practice to add an arbitrary to the Montreal rate. Montreal, through its geographical

situation at the head of ocean navigation and as the terminal of the western river and lake routes, is a natural breaking point. This group with its blanket rate takes in a large area -- Montreal to Windsor, 555 miles -- Montreal to Sudbury, 444 miles -- Niagara Falls to Sudbury, 337 miles -- Windsor to Sudbury, 480 miles. The distance from Montreal, the most easterly point, to Fort William, the head of the lake navigation and the rate breaking terminal between Eastern and Western Canada, is 997 miles. From Windsor, the most westerly point, the distance is 1,032 miles.'

"The Board further stated in its judgment 'the blanket rate covering this territory is justified by the governing conditions outlined'"

An example of a blanket rate brought about through equalizing competing producers in a given area is to be found in the grouping of fruit rates in the Okanagan. The rate that is applicable to shipments from the Okanagan group is the average rate from the group so that even though the blanket rate governs the whole valley (there is one small exception at Osoyoos on account of the special consideration of the building of the railway south from Haynes), a shipper at Penticton would pay less while a shipper from Armstrong would pay more than would be the governing rate if actual mileage was to be applied from each shipping point.

Rate Grouping is a result of commercial necessity and is, in my submission, of benefit to commerce. Insofar as the Railways are concerned, their revenues are preserved, because, in arriving at the rate which is to apply from the Group, volume from the various points in the Group, as well as the differences in distance from points within the group, are taken into account.

There has been some discussion of the principle of rate groups during the evidence given on behalf of Alberta. While Professor Stewart, page 10577, Volume 55, and Mr. Harries at a number of places in the transcript, for example, Volume 56, page 10814, stated that they considered grouping should be a recognized principle in the freight rate structure, I find in Volume 80 that Mr. Frawley, in answer to you, my Lord, stated "I have an objection to rate grouping as such."

The point I wish to make here is that both arbitraries and rate groups are exceptional methods of dealing with particular problems. That they are necessary has been amply proved, not only in Canada, but also in the United States, where they have been extensively used. I wish to emphasize that any scheme of equalization would have, unless great disturbance was to be caused, to be a scheme that would enable rate groups and arbitraries to continue as a part of our rate structure. Equalization, under the existing law, would not disturb this method of rate-making. However, when one considers Alberta's amendments one is struck most forcibly by the fact that the proposed Section 329A(2) recognizes the principle of Rate Groups but does not recognize the principle of arbitraries. I submit that this fact shows how radical and far reaching Alberta's proposed legislation really is and also illustrates the dislocation and rigidity implicit in the proposals of Alberta.

I should now like to discuss with you competitive rates, if I may.

THE CHAIRMAN: Where do we find that?

MR. SINCLAIR: At page 58 of my notes. I am not saying that these other matters are not important; but in the subjects that I have been assigned there seem to be some that are more important than others, having regard to some of the remarks that have been made concerning them.

COMPETITIVE RATES

The written submissions of Canadian Pacific are at pp. 70-100 of Part I and in the tables at pp. 56-61 of the Appendix to Part I. Mr. Jefferson's evidence is in: Vol. 67, pp. 13933-84; Vol. 68, pp. 13986-14010; pp. 14119-24; Vol. 74, pp. 15013-45; Vol. 77, pp. 15579-85; Vol. 78, pp. 15713-14; Vol. 79, pp. 15756-811; Vol. 81, pp. 16068-79; Vol. 82, pp. 16271-88; pp. 16330-44; Vol. 83, pp. 16347-53; Vol. 84, pp. 16549-50.

The next type of rate that I propose discussing is Competitive Rates. This type of rate has been a subject of many representations to your Commission and amendments to existing legislation have been proposed by Manitoba, Saskatchewan and Alberta.

Under the heading of Competitive Rates rather special types of problems emerge and I propose to deal separately with Transcontinental rates when discussing the Long and Short Haul Rule. I also propose to deal separately with Agreed Charges under Part 5 of the Transport Act. With these exceptions I will now discuss Competitive rates.

I submit that a most useful summary on these rates will be found at page 70 of Part I of our written submission. I refer to Paragraphs 46 to 49 and Paragraph 51. (Para. 50 of Outline deals with Transcontinental Rates.)

"46. Competitive rates are made for the sole purpose of obtaining traffic that otherwise would be lost to the railways. The level of a competitive rate is not set by the railway but by the competition. A railway has, and necessarily must have, the privilege and responsibility of deciding whether to establish a

competitive rate or forego the revenue which could be derived from handling the traffic.

47. As competitive rates are made with particular regard to the traffic on which they are to apply, they cannot be applied as maxima to intermediate points where similar competition does not exist.

48. When a railway, by reducing a rate to meet competition, secures or retains some remunerative traffic that it would not otherwise handle, there is benefit both to the shipping public and to the railway.

49. In such circumstances a community, in which the railway does not have to compete with other transportation agencies, does not suffer when the railway establishes competitive rates in another area. The lower level of transportation charges in the competitive area would be effective there even if the railway had not found it necessary to reduce its rates in order to secure or retain traffic.

51. Canadian Pacific submits that the principles governing competitive rates as provided in the Railway Act are sound and no amendments are necessary or desirable."

I have left out Paragraph 50 because it deals with transcontinental rates.

The general principles governing competitive rates are set out in the further submissions of the Company, which are found at pages 70 to 73 of Part I of our submission.

I submit that our evidence has made it clear that with the exception of rates on Alberta Coal to Ontario -- those are not carrier competitive rates in the true sense; they are really pressure rates; they were put in at the request of the government to meet market competition with American coal. -- and possibly certain at-and-east grain rates, competitive rates are undoubtedly compensatory. One fundamental principle that is often overlooked is that the very large majority of competitive rates are moving high-grade traffic where the normal rates are at a high level, much above the out-of-pocket cost and something extra, which is the basic criterion of the compensatory nature of rates. You will recall the evidence (Gaffney, Vol. 49, p. 9303 and Fairweather, Vol. 109, p. 20119) was that truck costs are about 3¢ to 5¢ per ton mile. The bulk of low-grade commodities, particularly those moving at low rates, are not, generally speaking, subject to truck competition.

Water competition, on the other hand, is able to handle bulk and low-grade commodities but the railways are generally able to compete because they have the advantages of flexibility, speed and year-round uninterrupted service.

I should like to recall to your Commission the evidence as to how Canadian Pacific tests the compensatory nature of competitive rates. In volume 67, page 13961, Mr. Jefferson stated:

"When competitive rates are reviewed and a decision is reached to allow the competitive rate to remain unchanged the Canadian Pacific has satisfied itself that not only would an increase in rate result in a loss of traffic but also that the rate, as it stood, was reasonably compensatory. In this connection the practice followed by the Traffic Officers of the

Company in determining whether a given rate is compensatory is to consider, among other things, the car mile and ton mile earnings, the length of haul, and the volume of traffic involved.

If the car mile and ton mile earnings are at least equal to the average of the earnings of the system it is considered that prima facie the rates are compensatory. In marginal cases such matters as length of haul, volume and direction of movement of traffic, may be the determining factors."

In tables contained in Appendix to Part I of our Submission we show examples of the compensatory nature of competitive rates.

The examples shown were selected at random but all represent rates on which there is a regular movement of traffic.

The tables show the length of haul, average loading weight and earnings per car, per car mile and per ton mile.

The following tables show this information:-

Pages 56 to 59	Motor Truck and Water Competitive Rates in Eastern Canada - Domestic Traffic.
Page 60	Motor Truck and Water Competitive Rates in Eastern Canada-Export and Import Traffic.
Page 61	Motor Truck and Water Competitive Rates Western Canada - Domestic Traffic.
Page 80	Agreed Charges - Eastern Canada and Western Canada.
Page 81	Eastbound Transcontinental Traffic.
Pages 82 and 83	Westbound Transcontinental Traffic.

The tables cited show that the earnings per car mile are, in practically every case, substantielly higher than the average per car mile earnings both in Eastern and in Western Canada and also the average per car mile for the system for the year 1948.

Our evidence has made it clear that the major factor in determining the level of competitive rates above out-of-pocket costs is experienced judgment. That is a major factor, but some people seem to think it is the only factor. When the Traffic Officer is in doubt about the

compensatory nature of the rate the matter is referred to our Research Department for study and analysis. You will recall that our research department is a research department. We have a statistical department that is separate from our research department, which is under the comptroller; but all that statistical material and all that statistical work of experts are available to our research department, and Mr. Newman said they were used. Our position in that regard is a trifle different from that of other railways. We keep our statistical department under the comptroller.

Mr. Jefferson (Vol. 82, p. 16223) put it this way - "If we are in doubt as to what we should do we have a further study made by the Research Department". You will recall that Mr. Jefferson said that he referred rates to our Research Department quite a number of times in a year, but that it would be completely unrealistic to have a detailed cost analysis done on every rate, and that by using the so-called "rule of thumb" tests, and referring to the Research Department for analysis the marginal cases, a workable practice was followed.

Mr. Shepard, (Volume 118, page 12389) complained that Canadian Pacific did not maintain revenue and cost analyses which would enable them to determine whether traffic was or

was not compensatory. He said "we feel that such an analysis would reveal that the Railways are today losing money on certain competitive rates."

I ask you to note that we have Mr. Shepard's "feeling" to put against the evidence of Mr. Walker and Mr. Jefferson. Mr. Walker spoke about policy; Mr. Jefferson showed how the policy was carried out. Dr. Innis asked Mr. Shepard whether he accepted Mr. Jefferson's tests as to the compensatory nature of a rate. Mr. Shepard (page 21413) answered: "No, we don't, very definitely." You, my lord, pointed out that the test that Manitoba was suggesting was that in Section 325(B), where the Board would require the Railways to maintain certain revenue and expense accounts for the purpose of determining the compensatory nature of rates. Dr. Innis, in his question to Mr. Shepard at page 21414, Volume 118, showed that Manitoba had merely a suspicion, and had nothing practical to suggest. Dr. Innis asked Mr. Shepard how the Board would develop the test and Mr. Shepard said he had not developed any specific tests and he did not know what they would be.

THE CHAIRMAN: As to Section 325(B), the amendment appears at page 22 of the Consolidation.

MR. SINCLAIR: Yes. He says there:

"Notwithstanding anything contained in this Act it shall be the duty of the Board to maintain a constant supervision over tariffs of tolls with a view to insuring that all rates are compensatory."

He did not suggest how that could be done or how many men it would take to do it. I would say it would certainly take some hundreds of men to do it; and then I do not know what tests they could use. I say that they could only use the tests that we have been using on the railway. Then he goes on:

"(2) The Board may require the railways or any one or more of them to establish and maintain such revenue and expense accounts as it may prescribe for the purpose of determining whether or not the rates or any one or more of them are compensatory."

What does he want us to keep them for? He does not know. He does not say how we are going to use them, but he just wants us to keep them anyway. That is what it gets down to, I submit.

(Page 23655 follows).

I submit, most emphatically, that the only tests the Board could use are the tests that Mr. Jefferson today is using.

Mr. Shepard (page 21392) is obviously under the impression that the Canadian National, on account of certain evidence given by Mr. Fairweather, which I will refer to later, do a more thorough job of costing than do the Canadian Pacific. I say this is not so. The Statistical and Research Departments of the Canadian Pacific are as adequately staffed, as efficient and as resourceful as those of the Canadian National, or any other railways.

Mr. Shepard, (Volume 119, pages 21483-84), pointed out that the Canadian Pacific tested the compensatory nature of rates in the first analysis by the average system revenue per ton mile and per car mile. He pointed out (top page 21484) "it stands to reason that some other classes of traffic must be below the system average and," -- listen to this -- "therefore, . . . by the Canadian Pacific tests, non-compensatory." Here we have Mr. Shepard's understanding of the situation. He seriously puts to your Commission the fact that all traffic moving below average system revenues, mark you, revenues, is non-compensatory, in other words, that cost is 100% variable with traffic. He is saying that the average cost of handling traffic is its average revenue. The out-of-pocket cost of handling traffic certainly is below the average system revenue; if this were not so the Canadian Pacific would certainly be piling up a tremendous operating deficit.

The reason that railway Traffic officers, and the Interstate Commerce Commission, and the Board of Transport Commissioners can look at average car and ton mile revenue figures is because they know that there is not less than 20% of costs which are constant. When we are

locking at the compensatory nature of a rate we look at out-of-pocket costs. Mr. Shepard seems to think that cost and revenue are synonymous. I have heard a lot of fancy phrases and ideas advanced in these proceedings, but the concept of "out-of-pocket revenue" tops them all.

In Volume 70, page 14402, I put a number of questions to Mr. Harries of the Province of Alberta in the matter of non-compensatory rates, and I would now like to read a short extract from the transcript:

"Q. What examples have Alberta, or have they any, of non-compensatory rates in the rate structure of Canadian Railways?

"A. I was pointing out, Mr. Sinclair, that that was the position we had taken in the 30% Case.

"Q. You are not taking that position now?

"A. Well, we take it as a matter of principle, but I would not be able to point out today any give-away rates that the Railways have."

Surely, "we take it as a matter of principle"!

In accordance with the request of Commission Counsel, Volume 93, page 17715, I have forwarded to the Commission examples of the cost analysis done by our Research Department for the Traffic Department in these marginal cases of which I have been speaking.

Mr. Newman, in his evidence, (Volume 93, page 17714), acknowledged that the experienced judgment of Mr. Jefferson and the use of the "rule of thumb" tests made it unnecessary to have detailed cost analyses for the numerous competitive rates. Mr. Fairweather admitted to Mr. Evans in Volume 111, page 20376:

". . . I quite agree that in the practical working of the Traffic Department every rate change is not referred to us for analysis.

What they do refer to us is all the cases where they think there is danger that they might be unprofitable."

My instructions are that the mass of competitive rates are handled in Canada in the same way as in the United States.

Some interest has been shown by the Western Provinces, particularly Alberta (see questions of Mr. Frawley of Mr. Jefferson, Volume 68, pages 13989 to 14006) in the competitive Pick-up and Delivery rates which are applicable only to less than carload traffic. Pick-up and Delivery service is provided by the Railways only in those areas where there is keen truck competition. Undoubtedly the cost of providing pick-up and delivery service on less than carload traffic has materially increased in the last few years and the level of these rates has been for some time under review by Canadian Pacific Traffic officers.

Mr. Jefferson, at Volume 68, page 13992, stated that the pick-up and delivery rates in Ontario and Quebec were in the process of being increased. The latest adjustment which has taken place covering these rates in Eastern Canada was the rearrangement of the classification in the four groupings applicable. This point was explained by Mr. Jefferson during cross-examination by Mr. MacPherson, Volume 78, page 15714 to 15714-B.

In Western Canada the pick-up and delivery rates are the regular less than carload rates. Free pick-up and delivery is given at certain stations on commodities in the first four classes for distances up to 400 miles.

As is pointed out in the table at the bottom of page 86 of Part I of our submission, the percentage relationship of pick-up and delivery expense to total less than

carload revenue is quite reasonable.

In the view of Canadian Pacific the railways must give a complete less than carload service. If some of the pick-up and delivery rates on short haul movements, after deducting the P. and D. expense, are non-compensatory, the amount of traffic moving on those rates is quite small. If the railways did not meet truck competition on short haul traffic this would jeopardize the Railways' ability to provide the complete service that shippers demand and would, in all likelihood, result in them losing longer haul traffic to the trucks, which is, undoubtedly, remunerative to the Railways. This is merely an example of the inability to fix a hard and fast rule applicable in every minutae of rates. The handling of less than carload traffic for short hauls is a problem that is constantly receiving attention and study by the Canadian Pacific. It is our view that in the case of certain short haul traffic trucks are the most expeditious and lowest cost media of transport.

To provide a complete service both for long haul l.c.l. traffic moving through a distributing centre and short haul traffic originating at the distributing centre, both destined to the same location, Canadian Pacific are attempting to provide truck services to co-ordinate with their rail operations. This phase of the Company's endeavours is still in the experimental stage, as was explained by Mr. Crump, Volume 66, page 13821.

In view of the extensive evidence given by Mr. Jefferson on the subject of competitive rates, I do not think that I need to go through the matter in detail but with your permission will now turn my attention to a consideration of the amendments which have been proposed to the Railway Act on the matter of competitive rates.

Manitoba, by amendments to Sections 328, 329 and 332 (Volume 108, pp. 20002 to 20003) would make it impossible for the railways to continue to publish competitive tariffs as such. Under Manitoba's proposed amendments, only two types of tariffs would be possible -- that is, standard freight tariffs and special freight tariffs.

If the railways were required to reduce rates to meet competitive conditions, this would have to be done by means of a special freight tariff. As a result, all the rules applicable to special freight tariffs would be operative rather than the rules applicable to competitive freight tariffs.

THE CHAIRMAN: Does that mean going to the Board in each case?

MR. SINCLAIR: No, you do not have to go to the Board to put in a special rate. You only have to go to the Board when you are dealing with standard rates. You see Manitoba's proposal would be that all rates, other than competitive rates and certain development rates, would be moved up into the standard rates so that he would have us going to the Board for every rate except competitive rates which he would call special rates. When you do that and do not change these various sections of the Act you will find yourself in the same position as Mr. Frawley finds himself. He did not touch section 317, you will recall; he deals with Section 314. Mr. Shepard, if I may use the phrase, is playing about with Section 328, and he is not affecting those sections of the Act which provide for competitive rates and competitive tariffs as such. It has a very restrictive effect that is sometimes rather difficult to follow. This Act was not constructed to do the things Mr. Shepard is trying to do with it, and our whole rate structure is not constructed

in that way.

Under the amendment to Section 329 which is proposed, subsection 4 would be deleted. This, on the surface, might seem to be rather innocuous and flow as a natural result of the proposal to amend Section 328. However, because of the fact that special freight tariffs cannot contain rates for a shorter distance at a higher rate than for a longer distance over the same line in the same direction, if such shorter distance is included in the longer, long-and-short haul departure would be absolutely prohibited and I will deal with this further when dealing with the long-and-short haul rule.

Surely Mr. Shepard did not mean to do that. Nevertheless that is what he has done. He has put himself out ahead of Mr. Frawley just like Mr. Brazier did.

Manitoba also proposes to delete Section 332 from the Act. This would result in making inoperative the regulations of the Board under their Tariff Circular published pursuant to General Order No. 669, in so far as it deals with competitive freight tariffs, so that the rules as to special freight tariffs would be the only ones which would govern. The effect of this is clear -- it would prohibit the railways from meeting competitive conditions except on three days' notice, instead of giving the railways the right they presently have to put in tariffs and make the rates they contain effective immediately in dealing with unregulated competition. That is the only type of competition you can do that on. The necessity to move quickly in dealing with competitive conditions was emphasized by Mr. Jefferson at page 16331, Volume 82, during his examination by Mr. Covert.

Manitoba's proposals, I submit, would not be supported by shippers or consignees and would unduly

restrict commerce and have a very detrimental effect on railway revenues without, I say, having any benefit to any section of the community.

THE CHAIRMAN: Does Mr. Shepard ask for the repeal of Section 332, or is that effectively what he suggests? You have just said that?

MR. SINCLAIR: Yes. You see he is intending to knock out Section 332 altogether.

THE CHAIRMAN: He says so in his amendments?

MR. SINCLAIR: Yes.

THE CHAIRMAN: We will adjourn now.

---The Commission adjourned at 1.00 p.m. to resume at 2.45 p.m.

Ottawa, Ontario.
Tuesday, May 23, 1950.

AFTERNOON SESSION

MR. SINCLAIR: I was at page 66 of my notes:

The proposals of the Province of Alberta on the subject of competitive rates are contained in their suggested revisions of Sections 329 and 332. Alberta proposes to revise Section 329(4) and make it a new section which they term Section 329B. As to Section 332, Alberta proposes a new subsection to be numbered 332(2).

THE CHAIRMAN: You are going to discuss that Section now, are you?

MR. SINCLAIR: Yes. 329B is at page 23 of our Consolidation, my lord, at the bottom of the page.

I have two points on the proposed Section 329B:-

First: By adding the words "or special" after the word "standard" in the second line of the present section, Alberta would preclude the railways from having a competitive rate higher than a special commodity rate. Under the proposed legislation a competitive rate must be lower than both the standard rate and the special rate instead of just lower than the standard. This would preclude the railways from effectively meeting certain truck competition. I think that this can best be illustrated by an example. Say the railways have published a special commodity rate between A and B with a 50,000 lb. minimum. Truck competition develops between these points and the trucks offer a rate lower than the standard class rate but higher than the special commodity rate with a minimum of, say, 15,000 lbs. The railways, in these circumstances, would meet the truck competitive rate by publishing a competitive freight tariff, at, possibly, a 20,000 lbs. minimum for a given rate which would be lower

then the class rate but higher than the special commodity rate because of the fact that it would be for a smaller minimum and it is this minimum that is the competition which the railways must meet.

The second point that I wish to discuss in connection with Alberta's proposed Section 329B turns on the fact that they have suggested the deletion from Section 329(4) of the concluding words, which are: "which the Board may deem or have declared to be competitive points not subject to the long and short haul clause under the provisions of the Act", and in place of the words so deleted Alberta suggests the words: "at which there is actual and compelling competition".

THE CHAIRMAN: Who would decide that, that there is actual and compelling competition?

MR. SINCLAIR: That would be the Board, under Alberta's proposal.

THE CHAIRMAN: Don't they strike that out, according to what you said a minute ago?

MR. SINCLAIR: Well, you see, Alberta makes 332(2):

"It shall be the duty of the Board to make such continuous examination of the competitive tariffs as to satisfy itself that the competitive tolls are no lower than necessary to meet actual and compelling competition..."

The Board would have to satisfy itself as to that under subsection 2 of 332 as proposed.

The amendment proposed to Section 332 also contains the phrase "actual and compelling competition" and again I wish to say that my remarks concerning this phrase in dealing with the long and short haul rule would be applicable.

The additional subsection that Alberta proposes to Section 332 does, however, contain other matters which I think must be discussed. It is proposed that the Board maintain "continuous examination" of competitive tariffs for the purpose of satisfying the Board that such rates are "necessary to meet actual and compelling competition" and also that the competitive tolls more than cover "the additional costs of the movement to which they apply". The effect of obligating the Board to maintain a continuous examination of competitive tariffs for the purposes set out in the proposed amendment is, I submit, clear. The effect is to substitute for the experienced business judgment of railway Traffic Officers a regulatory supervision. Railway Traffic Officers have large departments with representatives all through the country. These representatives are constantly discussing with the trade traffic movements and rates and are in close touch with all local conditions bearing upon traffic. The Board, if Alberta's proposals became law, would have to tremendously expand its staff to keep informed and this would add greatly to the costs of administration without any real prospect of material benefit.

THE CHAIRMAN: Do you have in mind this new subsection 2 of 332?

MR. SINCLAIR: This continuous examination - and you will recollect that Saskatchewan also had the thought that there would be continuous examination of competitive tolls.

I say that Alberta's proposals for amending Section 332 are on their face unworkable. At the least they would be burdensome and expensive to the railways and undoubtedly would materially increase the work of the Board. In spite of the burden they would bring about, I say that any results

that would be achieved in having rates ordered by the Board to a higher level would be so negligible as to be palpably insignificant. I say, in fact, that I doubt whether the Board would ever have occasion to order any higher rates. The practical aspect of the matter, if Alberta's proposed Section 332(2) came into effect, would be that the Board, by the very nature of things, would in the end be compelled to rely heavily on the information and judgment of the railway Traffic Officers and the net result would not be different than it is today.

THE CHAIRMAN: I was going to ask you about that. What burden is placed on the Board today by subsection 4 of 329 as it stands? It says the Board may deem any specified point or points to be competitive.

MR. SINCLAIR: The Board has power under that Act to use its discretion to determine and say that two points are competitive points.

THE CHAIRMAN: Not only has it discretion, but it says:

"The competitive tariffs shall specify the toll or tolls ... to or from any specified point or points which the Board may deem ...".

MR. SINCLAIR: That is, that they may consider to be.

THE CHAIRMAN: "Or that they have declared to be competitive points." Now, what evidence have they to go on as to that?

MR. SINCLAIR: Well, under the deeming of it, I say they accept the fact that the railways say they are competitive, and they take notice of the fact that the railways are cognizant of the situation and that they are prepared to accept that, and they therefore deem it to be a movement between competitive points.

THE CHAIRMAN: And you say there would be nothing in these amendments to prevent them from adopting the same practice?

MR. SINCLAIR: That is right. I would say that in the practical result, my lord, they would have to come down to that.

Saskatchewan's suggested amendments to Section 332 would require the Board to "investigate and determine" if all competitive tariffs are "proper tariffs". Now, here is where we get into something different; this is Saskatchewan. What would be a "proper tariff" within the meaning of the Act is not set out.

THE CHAIRMAN: Is the word "proper" there?

MR. SINCLAIR: Yes, Saskatchewan uses the word "proper" in their proposed legislation. It is on our page 24 of our Consolidation.

THE CHAIRMAN: Oh, yes, I see it.

MR. SINCLAIR: Your Lordship drew attention to this at p. 21674, Vol. 120. No doubt what Saskatchewan intends is that the Board should be compelled to ascertain whether the competitive rate was necessary, was no lower than required to meet the competition, and was compensatory.

Once, again we are back to the same position, that that is what we do today, and the railway Traffic Officers, with their information and with their knowledge of the situation, proceed on that basis.

I submit that the effect of the Saskatchewan proposal would be to transfer to the Board a duty that it cannot carry out as effectively as is now being done by railway Traffic officers because of the railway sources of information and experience.

The proposed amendments on Competitive rates, I submit, can be characterized as a suggestion by the Provinces

that the Railways should be protected from themselves, and that we are not competent to handle our affairs in a businesslike way. Dr. Innis called this point to Mr. Frawley's attention in Vol. 122, p. 21958. Canadian Pacific Traffic Officers can make errors, but, if they do, in dealing with competitive rates, their constant review of these rates will soon bring the error to light, and it will be corrected. Surely no one can seriously suggest that Officers of the stamp of Mr. Jefferson, who have spent so many days before your Commission, are the type of Officers who would be negligent to the extent; and this is what it amounts to, of throwing away the Company's money.

Mr. Shepard (Vol. 118, p. 21393), Mr. MacPherson (Vol. 120, p. 21672) and Mr. Frawley (Vol. 112, p. 21980) referred to the fact that competitive rates had not received the most recent increase of 16% which was awarded by the Board. Canadian Pacific on more than one occasion has advised the Commission that the competitive rates were increased 21% along with all other rates and in September of 1948 were further increased by 15%. Mr. Jefferson in this evidence (Vol. 67, p. 13941) pointed out that in addition to the 21% and 15% increases, many additional increases were made in the competitive rates. A large number of competitive rates have been increased anywhere from 50% to 100% since 1948 and some increases have been in excess of 100%.

Mr. Shepard at p. 21393, referring to the competitive rate situation, said that the East-West disparity in rate level had once more been aggravated. I submit that the freight rate burden on Western Canada has been lessened, - I mean on account of competitive rates - not increased ---

THE CHAIRMAN: Lessened by virtue of these competitive rates?

MR. SINCLAIR: Yes, by virtue of these increases we have put into effect on competitive rates. - since 1948 and I am not prepared to admit that there is a greater burden on the West than on the East. I am instructed that the average freight revenue per ton on Canadian Pacific in 1949 increased by 11.3% over 1948 in Eastern Canada, whereas the increase in Western Canada for 1949 over 1948 was only 2.9%. The average hauls in the East and the West in 1949 were approximately the same as in 1948.

I must say that I wish my friends from the Provinces would go a little more carefully into the facts before making statements which tend to cloud rather than clarify the issues that they have projected into this enquiry.

The submissions of counsel for the Prairie Provinces that the West is suffering tremendous hardship from competitive rates is, I submit, completely without foundation. After all, only approximately 12% of the gross freight revenue of Canadian Pacific is represented by competitive traffic. That is based on the 1949 figures from our Annual Report. It is about 35 million to 292 million.

The railways are most concerned about the problem of meeting increasing competition because competition is largely directed to very remunerative traffic. That is high rated and long haul, truck and water. But I submit Mr. Frawley's emphasis on competitive rates as the crisis of the transportation problem is far fetched.

COMMISSIONER INNIS: I find it a little difficult to square that paragraph with the one above. That is to say, traffic has increased by 11.3% in Eastern Canada in spite of this truck competition. Is that a--

MR. SINCLAIR: Well, after all, you see, Dr. Innis, the situation is this: There is a lot of traffic that moves at competitive rates, undoubtedly, but there is far more traffic that moves at non-competitive rates, and in Eastern Canada particularly there is a tremendous amount of interline traffic, United States traffic. Now, they have been subjected to some quite considerable increases. Then of course we had the position in Eastern Canada where grain, for instance, is now moving at non-competitive rates on account of the increases. They are up to the class basis.

(Page 23672 follows).

Then of course, we have the position in eastern Canada where grain, for instance, is now moving at non-competitive rates on account of the increases, they are up to the class basis.

COMMISSIONER INNIS: This doesn't seem to bear out the general impression that we have been given.

MR. SINCLAIR: No, no.

COMMISSIONER INNIS: That the trucks have been taking all the traffic in Canada.

MR. SINCLAIR: Well, I am saying, Dr. Innis, that you must keep the thing in focus. I am not saying it is not a serious problem. It is a serious problem, because the railways like all other businesses have differential prices, and what these trucks are doing, they are going and competing with us in our most remunerative traffic, where we are getting much more than our out-of-pocket costs, and we have a long way to come down before we ever get a non-compensatory level of competitive traffic to meet truck competition.

And when we get to the water, our transcontinental rates, there is the long-haul traffic where they are after us, and this again is very remunerative. So it is a matter of keeping the thing in focus, and I am just saying that Mr. Frawley, with his broad generalizations and accusations, has tended to get this thing out of focus. That doesn't say it is not a serious problem. It is just that he has over-emphasized it and put it on too high a level.

As Mr. Spence points out, that figure 11.3 is revenue per ton and not volume.

COMMISSIONER INNIS: Well, that is the point, that makes it even more serious.

MR. SINCLAIR: Yes, but as I said, the reason for that, that is what happened to Mr. Moffat in his Exhibit 326. He could not on a statistical basis give full weight to inter-line.

I submit that there has been no evidence adduced that would show any necessity whatever for any of the legislation proposed on competitive rates. On the other hand, there has been a great deal of evidence adduced to show the necessity for the flexibility provided by the existing legislation and also that the public interest is not, in any way, being impaired by the practices being followed by railway Traffic Officers. I, therefore, submit that your Commission should not recommend any legislative changes in the matter of competitive rates.

TRANSCONTINENTAL RATES

Reference to these rates will be found at pages 90 to 95 of our written submission, Part I, and in Mr. Jefferson's evidence at Vol. 68, pp. 14054-93; Vol. 79, pp. 15773-7; Vol. 80, pp. 16017-9; Vol. 82, pp. 16195-202; Vol. 84, pp. 16527-8.

The purpose of the rates is twofold; firstly, they enable the railways to meet actual or potential inter-coastal water competition moving via the Panama Canal. Secondly, they enable railways to secure traffic by assisting Canadian industries to meet competition from foreign countries moving to the Pacific Coast ports. Transcontinental competitive rates to Vancouver were the subject of considerable criticism, particularly from Alberta. I have a vivid recollection of the levity displayed when evidence was introduced of the resumption of intercoastal shipping between Eastern Canada and the Pacific Coast, and the scepticism, if I may use a mild word, that was shown by

certain of our Western friends when we were discussing the sailing of the "Eskdalegate". There were four sailings last year from Montreal. This year the seriousness of inter-coastal competition can be clearly demonstrated by a general letter to shippers from Monsen-Clarke Limited, dated April 15, 1950. I would now like to read this letter. This is Monsen-Clarke Limited, their letter dated April 15, 1950, headed: "Notice to Shippers no. 10, Montreal - Vancouver Service also calls Victoria".

"Gentlemen:-

"We wish to take this opportunity to express our regrets to the many shippers whose shipments could not be accommodated on the S.S. "Riverside", our first vessel from Montreal to Vancouver this season".

(this vessel has sailed)

"In order to ensure clearance on future sailings, we would suggest that bookings be made as far ahead as possible and if necessary same can be made on a tentative basis with confirmation being given fifteen days before sailing date of vessel".

Then there is a list of the sailing dates of the "Islandside", "Seaside", and "Oceanside".

"Monthly thereafter, also calls
Three Rivers outwards.

It has now been definitely established that our all water service offers considerable savings in freight charges over all rail rates and we would welcome the opportunity of quoting rates on your commodities."

They then set out their classes 1 to 10 without showing

any rate on class 9 which of course is livestock and they are not interested in that. I have put underneath their class rates the railway class rates, and I think the comparison is rather indicative.

	1	2	3	4	5	6	7	8	9	10
Class Rates	3.50	2.75	2.10	1.70	1.50	1.30	1.15	1.00	-	.85
Railway Class Rates	7.62	6.28	4.99	3.87	3.35	3.04	2.30	2.03	-	2 03

But here is what I want particularly to stress about this letter:-

"L.C.L. Shipments are assessed carload class rates."

That is one point, but then:-

"Special commodity rates and minimums quoted on request."

That is a point I want to dwell on when dealing with long-and-short-haul departures.

"NOTE:- Large quantities of materials for CALGARY and EDMONTON are being routed to Vancouver for furtherance. This method of shipping to these two points offers shippers a considerable saving. Special rates quoted on request.

"Looking forward to having the pleasure of handling a portion of your traffic to British Columbia and Alberta points, we are,

(signed) Yours very truly,
MONSEN-CLARKE, LTD.
G. McLaughlin."

Now, they are also advertising these sailings and these shipments in the Alberta papers. I am sure that they must have come to the notice of my friend

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Mr. Frawley.

The railways' claim that there is actual competition from intercoastal shipping has, I submit, been proven. I might also say that the facts have again proved Mr. Frawley's suspicions wrong.

I do not believe that anyone, after checking the tables dealing with Transcontinental rates in our Appendix to Part I at pp 81 and 82, would contend that transcontinental rates are today non-compensatory. The level of transcontinental rates is very materially affected by what will hold traffic to the rails on account of the superior service that the railways can give as against the low rates that are afforded, with slow service, by the water carriers. It is difficult to ascertain the exact commodity rates offered by water carriers because they are not regulated and are not required to publish or make available any schedule of rates, nor is there any reason which compels them to charge the same rate to all shippers or consignees. Now, that fact is also shown in the letter that I read.

COMMISSIONER INNIS: Do you know whether I.C.C. requires coastal steamships to file terms?

MR. SINCLAIR: Yes, the Maritime Commission does, yes.

There have been material changes in the transcontinental rates since they were open to review following the lifting of the Wartime Prices & Trade Board Order in 1947. Many rates were taken out, others substantially increased. Others were increased and it was found that we could not hold the traffic without making a downward adjustment in them.

Transcontinental competitive rates, just as all other competitive rates, are under constant review and

scrutiny by traffic officers, whose aim is to see that no lower rates are being provided due to competition actual or potential, than is absolutely necessary. Mr. Frawley's opinion that such rates might be unnecessarily low must be weighed in the light of the actual treatment that is accorded to them by railway traffic officers. The disparity between the water rates and rail rates can be illustrated by a comparison of the class rates offered by Monsen-Clarke, that is class rates in their letter of April 15 and published rail class rates.

While I have not any water commodity rates, undoubtedly they are well below rail competitive rates. Those are the rates that it is just practically impossible to ascertain with any degree of certainty.

I now turn to the subject of long-and-short-haul rule. This is a matter on which we have had a great deal of evidence.

LONG AND SHORT HAUL RULE

The written submissions and evidence of Canadian Pacific on this subject will be found in Part II, pp. 118-27. Mr. Jefferson's evidence is at Vol. 68, pp. 140⁸⁴-93; Vol. 77, pp. 1547⁵⁰⁷- Vol. 80, pp. 15956-16039; Vol. 81, pp. 16040-55.

I will now discuss the Long-and-Short-Haul-Rule about which we have heard so much, particularly from the Province of Alberta.

Section 314(5) and (6) of the Railway Act contain the Statutory provision on this subject.

Section 314(5) prohibits a higher rate being charged for a shorter distance than for a longer distance

in which the shorter distance is included unless the Board is satisfied that owing to competition it is expedient to allow a lower toll at the more distant point.

The railways, in meeting competition, publish whatever rate may be necessary to meet the competition at the more distant competitive point and maintain their regular rates to the intermediate territory where the competition is not a factor.

For many years Alberta has been complaining of the effect of the Long-and-Short-Haul Rule with respect to competitive rates, particularly in regard to its application to the transcontinental competitive rates.

I want to make it clear right here that when I am dealing with long-and-short-haul, I think we must remember that this rule by Alberta would apply to long-and-short-haul departures not only on transcontinental rates but on competitive rates or any other type where they do exist, and they do.

THE CHAIRMAN: Does every competitive rate include long-and-short-haul?

MR. SINCLAIR: Yes, it could, if it is not applicable to intermediate points. For instance, I will take a truck rate from A to B, and there is a point C that is a little bit off the highway, for instance, and I do not apply it there. There is no competition existing, or trucks are only moving through movements and I really have no competition at the intermediate point. Then I don't publish it at the intermediate point.

The question of transcontinental rates, including the propriety of charging lower rates between Eastern Canada and British Columbia Coast points than between Eastern Canada and intermediate points in the Province of Alberta, has been given consideration periodically for many years and has been dealt with in most of the general rates cases before the

Board of Transport Commissioners.

In essence, the complaint of Alberta is that they are not receiving the full benefit of water competition (and I say "full" because they are receiving some of them). Undoubtedly the lack of water competition to Alberta points is some disadvantage, but it is a geographic disadvantage which must be weighed against the geographic advantages of Alberta.

At times Alberta's representations have been that the rate to the more distant point should always be the maximum to the intermediate points. This has been stated by Mr. Frawley though he disclaimed emphatically, at Vol. 62, p. 13078-9, that that was his contention. I submit throughout these hearings his remarks show the obvious hope that one way or another something would occur which would result in the transcontinental competitive rates being applied to the intermediate points in Alberta, otherwise there would seem to be no benefit to Alberta in adopting the amendments proposed by Mr. Frawley. Alberta's contentions have not found favour with the Board any time they have been enquired into.

THE CHAIRMAN: Where are those amendments to be found?

MR. SINCLAIR: That is his Section 314A, p. 16 of our consolidation.

A very clear statement on the matter of the long-and-Short-Haul-Rule with regard to transcontinental rates was made by Chief Commissioner McKeown in his judgment on the General Freight Rates Investigation, (1927) 33 C.R.C. 127 at p. 135. The statement to which I refer is set out in our written submission, Part I, commencing at the bottom of page 91.

At this point I might say that increases in the normal rates and the removal of the Mountain Differential has resulted in a combination of the Vancouver rate plus the rate back to Alberta points making lower charges than the single factor rate to Alberta points, but this is applicable only in a few cases. The matter was dealt with by Mr. Jefferson at Vol. 77, pp. 15477 to 15481 and I will now read some short extracts from this evidence which succinctly states the situation:-

"A. There are now about ten instances where the transcontinental rate to Vancouver plus the rate back is lower than the rate to Calgary. Mr. Harries pointed this out to the Commission at page 12044 of the transcript.

"THE CHAIRMAN: Q. There are about ten cases where the combined rates are lower than the straight rate to Calgary?

"A. That is right, yes sir.

"COMMISSIONER ANGUS: Q. In these instances is the shipper to Calgary allowed the benefit of the combined rates?

"A. Yes, sir. He ships a car direct to Calgary and we do not charge him higher than the rate to Vancouver and back to Calgary."

The question of minimum weights is relevant and this was explained to Mr. Frawley by Mr. Jefferson at p. 15481. Mr. Jefferson said:-

"A. Well, I want to be clear on that now. If you wanted the car from Montreal delivered at Calgary, when it reached Calgary you would have to have 70,000 pounds in the car, and the rate to Vancouver

and the rate from Vancouver to Calgary would be protected without taking the car to Vancouver and back. But if a man shipped a 70,000 pound car from Montreal to Vancouver and it went right through to Vancouver and then he wanted 40,000 pounds of that car in Calgary, he could ship the 40,000 pounds back from Vancouver to Calgary and still get the \$1.40 rate. Is that clear, Mr. Frawley?"

"MR. FRAWLEY: Yes, that is clear, Mr. Jefferson."

I submit that Chief Commissioner McKeown's statement that the instances of where the combination makes lower than the single factor rate are today just as they were in 1927, to use his words "not impressive" and "they do not touch the principle of transcontinental rates, which, under present conditions, need no justification."

Where the use of the competitive rate to the Pacific Coast plus the rate back makes lower to Alberta than through one factor rates from the East to Alberta, it is an advantage to the Alberta consumer because he receives the benefit of lower rail charges than if the railways did not meet the competitive rate at the Coast points. By publishing a competitive rate to Vancouver the railway does not necessarily benefit the Vancouver receiver as he is in a position to obtain even a lower rate by the water route through the Panama Canal in which case he could still ship his goods back into Alberta at even a lower charge than the use of the railways' competitive rates to Vancouver plus the rate back.

THE CHAIRMAN: What have you to say about this back shipping today on the railways?

MR. SINCLAIR: Well, there are a few cases.

THE CHAIRMAN: I thought measures had been taken to put an end to it.

MR. SINCLAIR: We did, but on account of the mountain differential coming off and this increase, it has happened that in a number of cases, if the combination of the rate to Vancouver plus the back haul makes lower than the single factor rate, there are a few cases; but in every case we protect that combination. We do not move the traffic to Vancouver and back again. Now, there is one - -

THE CHAIRMAN: How do you avoid it?

MR. SINCLAIR: Well, because we just charge the consignee the freight - -

THE CHAIRMAN: Where is the consignee?

MR. SINCLAIR: We will say in Calgary. We only take the car from Toronto to Calgary and we charge him the rate which is a combination of the rate to Vancouver plus the back haul, Vancouver to Calgary, and we take it as a single factor, one rate. I want to be fair to Mr. Frawley, and I think it was made clear in the evidence that there is a question of differing minimums.

THE CHAIRMAN: Differing minimums?

MR. SINCLAIR: Yes.

THE CHAIRMAN: What is a differing minimum?

MR. SINCLAIR: Well, there are 70,000 pounds as against 40,000 pounds. That does bring up a small complication, but I think that once again Mr. Frawley has blown this thing up out of its true context and proper focus. I say that is not impressive, they were not impressive in 1927 and they are not impressive today. There are a very few cases where this problem does apply, but where we can we protect it.

The steamship operators are actually soliciting

freight from Eastern Canada to Calgary and Edmonton routed by ship through the Panama Canal then to Vancouver and then from the Coast by rail, pointing out in their advertisements that this method of shipping to Calgary and Edmonton offers a considerable saving. (Monsen-Clarke letter of April 15, 1950 -- that is the letter I read into the record.).

The only amendments which have been proposed on the Long-and-Short-Haul Rule are those suggested by the Province of Alberta. Mr. Shepard for Manitoba at Vol. 119, pp. 21436, stated that Manitoba "supports the submissions made by Alberta on this subject." He then went on to state that Canadian Pacific had taken the position that there was a difference of opinion between Manitoba and Alberta and he denied this to be the fact. I still say that there is a difference between the submission of Manitoba and Alberta. Manitoba on the Long-and-Short-haul Rule has gone far beyond anything which is in their briefs to this Commission. The only reference that I can find in Manitoba submissions dealing with the Long-and-Short-Haul Rule has to do with Trans-continental rates, and that is to be found on pp. 120-122 of the printed submission.

THE CHAIRMAN: Now, when Alberta deals with transcontinental rates, we know that means what they call unfair rates to Calgary and Edmonton, for instance. What is Manitoba's case?

MR. SINCLAIR: Of course, Manitoba realized a point that I made, and that has been made by the railroads many many times: that if the transcontinental rate is to be blanketed back as a maximum, then these other places will descend upon the railway and ask for proportionate reductions in accordance with their mileage as compared with Calgary mileage. In other words they are hoping, by having Mr. Frawley's hope come into being, to also be

what I would call a secondary sequetur trust, something that Mr. Frawley has tucked away in the back of his mind even though he denies it.

THE CHAIRMAN: You keep on walking back then?

MR. SINCLAIR: That is right.

THE CHAIRMAN: How far back would you go?

MR. SINCLAIR: I don't know how far.

MR. FRAWLEY: Bonheur , Ontario, I think was the name of the place.

MR. SINCLAIR: Mr. Frawley will have plenty of time to talk about this. You don't only go back to where the competitive rate makes the maximum; you go back far beyond that, because people like shippers and receivers in Mr. Shepard's province will come and ask for proportionate reductions on account of their rate, even though their rate might be lower than the maximum blanketed back because of the mileage comparison.

THE CHAIRMAN: What about Saskatchewan ?

MR. SINCLAIR: They would be in the same position.

THE CHAIRMAN: I want to know what position they have taken.

MR. SINCLAIR: They have taken no position on this.

THE CHAIRMAN: That is what I thought.

MR. SINCLAIR: And I say that Manitoba's position they have taken, they did not realize they were taking.

COMMISSIONER INNIS: What causes the blanketing back in the United States?

MR. SINCLAIR: Of course, I say the situation in the United States on this subject is quite different to what it is in Canada. In the United States you cannot secure relief - -

THE CHAIRMAN: You cannot what?

MR. SINCLAIR: If ^{you} cannot secure relief under the 4th Section of the Interstate Commerce Act, then you have either to forego the competitive rate or apply it as a maximum to the intermediate point. Then you have got the problem of proportionate reductions. There was a part I was coming to later about the situation in the United States.

Transcontinental rates is only one type of competitive rate which gives rise under certain circumstances to Long-and-Short-Haul departures. Moreover, Manitoba, as pointed out by Mr. Brazier, Vol. 46, pp. 8843-4, did not desire transcontinental. - -

THE CHAIRMAN: Pardon me, I think you are answering the question I was asking a while ago. You say that transcontinental rates is only -- pardon me, only one type, that is right. There are other types?

MR. SINCLAIR: Yes.

Moreover, Manitoba, as pointed out by Mr. Brazier, Vol. 46, p. 8843-4, did not desire transcontinental to have different criteria than other competitive rates concerning which Manitoba were willing to adopt Mr. Walker's criteria.

In these respects, therefore, Manitoba has departed from its brief. Moreover, I say the amendments which Manitoba has suggested on the matter of competitive tariffs and rates has an effect on long-and-short-haul departures far and beyond anything ever suggested by Alberta. I will discuss this in detail later.

The greatest difference between the position of the Canadian Pacific and that of Alberta is that, in having departures from a strict application of the Long-and-Short-Haul Rule, Alberta would compel the railways to first make

application to the Board (Vol. 77, p. 15483). Canadian Pacific, on the other hand, say that such a procedure would be burdensome and serve no real purpose.

THE CHAIRMAN: Would it be burdensome even in connection with the transcontinental rates?

MR. SINCLAIR: Yes. I have here a file that I had taken out of our vaults. It dealt with an application for relief from the 4th Section of the Interstate Commerce Act, and it dealt with the international class rates where there were certain long-and-short-haul departures. Now, there is one file, and I think it would be rather indicative if I had the time to go through this page by page and letter by letter and exhibit by exhibit with this Commission, and just to see the tremendous amount of work and maps.

THE CHAIRMAN: That will have to be the next Commission.

MR. SINCLAIR: Well, I am afraid, sir, some of these people that are opposing these things just don't realize where they take it. There is one case, and I also got out of the vaults a few of the exhibits. Now, here are Exhibits 72-82. That is one case, and there are literally hundreds and hundreds of rate comparisons and maps in this case. Now, for Mr. Frawley to say that this would not be burdensome, I say it is just ridiculous. We have been through this situation; Mr. Frawley has not been. It is all very well for him to sit there at the counsel table and make railways sweat through a thing like this and ^{to} him ask questions. Maybe he likes to see me work that hard, but I don't like it and neither do the traffic officers, for no good purpose.

COMMISSIONER ANGUS: How recent is that case?

MR. SINCLAIR: This is the international class rates, I think it is 1940 when we finished.

COMMISSIONER INNIS: I don't think Mr. Frawley is vindictive.

MR. SINCLAIR: Oh, no, I don't think he is vindictive, Dr. Innis. With great respect, I say it is a lack of knowledge of the practical workings of what he is asking this Commission to recommend. I say that in all seriousness. I don't think that that is the situation.

Mr. Buckingham has just brought up a note to me which says: "Don't make the mistake of thinking that is all of it. You have only got part of the file". That shows you how far it goes.

MR. FRAWLEY: You had better re-open the case and call him.

MR. SINCLAIR: There are other differences which arise from the wording of the proposed Alberta amendments. I wish to make it clear at this point that if the Railways were compelled to blanket the competitive rate back to intermediate points, the revenues of the Railways would be affected by not only having the competitive rate operative as a maximum, but points which would take lower than the maximum would contend that they were entitled on account of their shorter distance to proportionate reductions in the rates that were applicable to their traffic. That is the point before. That point is noted by Mr. Commissioner McKeown in 1927 case also.

This point, I may say, was brought out by the railways during the General Freight Rates Investigation of 1927 at which time it was contended that the cancellation of the transcontinental rates would not benefit Calgary

and Edmonton. In the alternative, if they were made applicable to Calgary and Edmonton, there would undoubtedly be a demand for their extension to Saskatchewan and Manitoba points, and this would involve a tremendous loss to the railways.

Mr. Jefferson at Vol. 77, p. 15494, again emphasized this fact and I submit it is unchallengeable.

I wish to emphasize, in discussing long-and-short-haul departures, the tendency is to deal particularly with the transcontinental rates but what Alberta and Manitoba proposes goes far beyond this as the same principles are applicable in literally thousands of cases throughout Canada where there are competitive rates between given points to meet water and truck competition as well as the short line mileage of a competing railway.

If prior approval of the Board was necessary before long-and-short-haul departures could be made, the railways in no case would be able to publish rates to meet competition and maintain their normal rates at the intermediate points until the Board had come to a decision after a hearing and permission was granted. For example, the Canadian Pacific would not be permitted to meet rates published by the Canadian National between Edmonton and Vancouver and likewise the Canadian National would not be permitted to meet the rates published by the Canadian Pacific between Vancouver and Calgary until such time as applications were filed with the Board, supported by facts and after an Order had been issued by the Board granting the right to make departures. This procedure would be necessary with respect to each and every individual rate throughout the country where the distance via one line is shorter than via that of the other.

I don't want anybody to get the impression that

you make one of these applications, because you would come up to a place where you wanted to publish a commodity rate where previously you had a class rate. That causes Mr. Frawley and his friends, or people that have the same idea, to once again put us through the procedure that these amendments would require us to go through.

Long and short haul legislation as proposed would be unjust and unfair to the rail carriers particularly when the competition they are endeavouring to meet is unregulated. In the United States on the inland waterways, barges are federally owned, and in any event they publish rates, their inter-coastal competition published rates, both commodity and class. Their competitors can provide rates at will without the necessity of publishing or filing them with any regulatory tribunal.

(Page 23690 follows)

That is the situation in Canada.

If the legislation proposed by Alberta was adopted the applications which would have to be filed by the railways for permission to depart from the Long and Short Haul Rule would by no means be trivial or easily prepared documents -- witness this file -- as it would be necessary to support them with a great volume of statistical compilations and other data. The preparation of the extensive applications which would be necessary would by no means be all of the task because when set down for hearing additional statistical exhibits and maps would have to be prepared, not only to cover the proposed lower competitive rates for the longer hauls but also with respect to the higher normal rates at the intermediate points.

Some applications filed by the United States railroads with the Interstate Commerce Commission have contained hundreds of pages.

The legislation proposed by Alberta would, I submit, result in no gain or advantage to the shipping public or the railways, the only advantage would be to those competitors of the railways who have a free hand to arrange rates at will to monopolize valuable traffic for which the railways would not even be permitted to compete without first going through a lengthy and costly procedure before the Board and in many cases the traffic would be irrevocably lost to the railways. The only difference is that the railways are now permitted to readily meet competition as and when it arises rather than as and when authorized by the Board.

I submit the only purpose of the additional work and expense to which the railways would be put under Alberta's proposals would be to satisfy requirements of what would be a useless part of the statute because the

rates to the competitive points are now compensatory and the rates to the intermediate points are now just and reasonable rates and it is the policy of the railways to so maintain them.

It is the view of Canadian Pacific that the railways should continue to be allowed to publish lower rates for longer hauls to meet competition without first having the propriety of such competitive rate, including the rate to the intermediate point, passed upon by the Board. I submit the Board now has full authority and power to investigate any new rate either upon its own motion or upon complaint. The same goes for any rate now in existence.

It must be borne in mind that in reality it does not follow that a lower rate for a longer haul is wrongful. It is only wrong if it is unduly low or creates unjust discrimination or undue preference. The public are fully protected under the present Act. Unjust discrimination is prohibited by Sections 314 and 317; non-compensatory rates may be disallowed under Section 325.

Some idea of the volume of cases that Alberta's proposal would bring about is shown by the experience in the United States where, I submit, the rigidity of the Fourth Section has been a hardship on both the shipping and receiving public and the railways. Mr. Jefferson, at p. 15493, Vol. 77, stated that "when the law came into effect in the United States there were more than five thousand applications for Fourth Section relief within the first six months after the law took effect." (Report on I.C.C. Activities - 1887-1937, p. 97).

Now if I may, I wish to examine the proposed legislation of the Provinces.

The most far-reaching could be that of Manitoba. The effect of their proposed amendments would be to prohibit

under any circumstances long and short haul departures. In every case, under the Manitoba proposal, regardless of the competition or the necessities of the case, the rate for a shorter distance included in a longer distance could never be greater than the rate to the more distant point. This comes about on account of the fact that Manitoba, while not advocating any change to Section 314(5) or (6), has recommended the abolition of competitive freight tariffs through its amendments to Section 328 and its proposed deletion of Section 329(4). I am forced to say, and I have great respect for my friends from Manitoba, that this is an example of making proposals, failing, I suggest, a complete understanding of the art of rate-making or a lack of completely thinking through the results and ramifications of what they have proposed.

THE CHAIRMAN: Before you go on, this is altogether apart from what you are dealing with, but you have called our attention to section 317 of the Railway Act.

MR SINCLAIR: Yes.

THE CHAIRMAN: Well, I notice that subsection 2 of that section says:

"The Board may by regulation declare what shall constitute substantially similar circumstances and conditions, . . ."

I just want to know from you whether the Board has now in existence regulations---

MR SINCLAIR: No, not to my knowledge. They have not declared, except in their judgments, what those---

THE CHAIRMAN: This has nothing to do with what you are discussing now.

MR SINCLAIR: No. I mentioned it this morning, my lord, because the amazing thing was, Mr. Frawley's amendments deal with those words in section 314, and he

does not touch 317.

THE CHAIRMAN: It says the Board may by regulation declare what shall constitute -- by regulation; that would be a general declaration.

MR SINCLAIR: Yes.

THE CHAIRMAN: What shall constitute substantially similar circumstances and conditions. Do you tell me they have not published any such regulations?

MR SINCLAIR: Not to my knowledge.

THE CHAIRMAN: They just deal with each case as it comes along?

MR SINCLAIR: That is right.

THE CHAIRMAN: All right.

MR SINCLAIR: The legislative changes proposed by Alberta are to repeal Section 314(5) and (6) and to add a new long and short haul clause in the form of a new section which they have termed 314A.

I submit it will be impossible to affirmatively prove as required by Section 314A, much of the detail that is known to Traffic Officers as we could not in many cases call evidence or give documentary proof of the necessary facts. If we had, for example, through verbal conversations, ascertained the rate of the competing shipping or trucking line which we were trying to meet and our only evidence of it was a verbal conversation with a shipping clerk in an office of a shipper or in the office of the shipping company, I can well imagine the violent objection to the admissibility of hearsay evidence that would come from Mr. Frawley -- and if that was not given effect to, because they would not be bound by it -- and a stirring allegation as to its unreliability.

In meeting unregulated competition, where no tariffs need be published by the unregulated carrier and

where different rates may be quoted to different shippers for the same service, how a railway could establish to the satisfaction of the Board that, to use the words of the second part of subsection 1 of the proposed legislation, "the toll at the competitive point is not lower than is necessary to meet the competition" is, I say, next to impossible in many cases. This is a matter of proof. That the Board would not strictly interpret the legislation may well be the result, but if it did not require affirmative proof then the matter would get down to accepting the business judgment of the railway Traffic Officers, which is exactly the situation that exists today. Of course, one of the purposes of Alberta's legislation is to supplant the business judgment of the railways by making it necessary for the Board to apply different tests.

That is what they say, but I do not know how they can do it, and they did not tell us what tests they were going to apply that were different. Mr. Frawley says that is what it was, but then he does not tell me why or what.

This is made clear at p. 13066, Vol. 62 of the transcript, where I put to Mr. Harries the following question and received the following answer:-

"Q. You want this rigid control rather than having this problem of long and short haul discrimination left to the good business judgment of the railway; is that the position of the Province of Alberta properly summarized?

A. Yes, I think that might be a way of putting it."

The next point I wish to deal with is the third part of the first subsection.

This would require the railways to establish to the satisfaction of the Board that the competitive rate would

give a reasonable expectation that the railways' net earnings would be greater. Here again I submit the onus of proof on the railway would be practically an impossible one unless the Board were satisfied to accept the judgment of the railway Traffic Officers, based on experience in traffic trends and other factors that are what may be termed nebulous, certainly nebulous in the sense that they do not lend themselves to establishment as facts before a regulatory body.

Next, I would like to discuss the phrase "actual and compelling competition" as it is used in the first part of subsection 1 in the proposed section.

When Alberta's proposals were being discussed and Mr. Harries was giving evidence, the phrase that Alberta was using had the word "active" instead of "actual". In determining what Alberta meant by the phrase, I think that two extracts from the transcript will be useful. In Vol. 62, p. 12085, Mr. Harries was being cross-examined by Mr. O'Donnell and Mr. O'Donnell asked:

"Q. With respect to criterion number one of your proposed amendment, it is that the Board should be satisfied that there be active and compelling competition. Now, what do you understand by 'active and compelling competition'?

A. I think the best way to explain that is to refer to the record yesterday, where we put those three cases of the United States in and indicated that the phrase active and compelling competition as used by us refers to a competitive situation which is real and not imaginary."

At p. 13067, Vol. 62, Mr. Brazier was cross-examining Mr. Harries and in dealing with the phrase "active and com-

elling competition" the following occurred:-

"Q. So you are eliminating potential competition?

A. Yes, in the sense that it is merely potential, yes."

I submit that the use of the words "actual and compelling competition" would be the subject of a tremendous amount of dispute and protracted hearings before the Board. It is a fundamental rule of statutory interpretation that words should receive their literal meaning. You cannot depart from that unless you get doubt out of the section itself. Applying this test to the words "actual and compelling" does not permit of the interpretation which Mr. Harries says Alberta has in mind. Even though it was possible to express in legislative language the thought of Alberta as expressed through Mr. Harries, what would constitute a real threat would be a matter of very considerable argument. Alberta would, no doubt, be contending that there was not a threat from competition, witness their attitude in these proceedings towards S. S. "Eskdalegate" and water competition between Montreal and Vancouver.

Now, this is right behind us, just a few months ago.

In assessing the legislation proposed by Alberta and the difficulties it would undoubtedly bring about, I think it is useful to refer to the transcript at p. 13003, where I was dealing with the necessity of railways taking the initiative in putting in competitive rates so that competition would not develop, and the following occurred:-

"MR. SINCLAIR: Well, I am asking Alberta's witness, my lord, if Alberta agrees with the statement that 'Rail carriers should take the initiative in revising their rates to meet actual or threatened competition by other carrier agencies'."

Mr. Harries' answer was: "Yes, in general I think that would be correct."

Under Subsection (1) of the proposed new Section 314A the railways must make an application to the Board for relief in respect of any competitive rate to a more distant point which is not to be blanketed back to intermediate points where the competition is absent.

Under Subsection (2), however, the matter goes much further. That is to say, if relief is granted under Subsection (1) and, for convenience let us assume the example used in Mr. Frawley's discussion with the Commission, it may be found that a rate of \$1.00 to Vancouver is justified under the three headings in Subsection (1) and that the rate of \$2.00 to Calgary is to stand. This would be the equivalent, in principle at least, of the United States legislation, as it has been interpreted in the jurisprudence of the Interstate Commerce Commission. However, by Subsection (2) an entirely new principle is introduced. That is to say, the toll to the intermediate point must be just and reasonable when compared with the rate for the longer distance to the competitive point. Thus, though relief be granted, a new difficulty arises in that the toll to the more distant point which is a competitive rate, is to be used as a measure of reasonableness of the non-competitive rate to the intermediate point.

Under the present legislation the Board has held consistently that a competitive rate cannot be used to test the reasonableness of other rates. *Dominion Sugar v. G.T.R.*, 15 C.R.C. 156; *Coyne*, *Railway Law of Canada*, p. 415.

Similarly, the Board has held that unless competition exists at both points in regard to which a comparison is being made, the competitive rate cannot be held to unjustly discriminate against the other point. *Salada Tea*

Co. v. C.F.A. 30 C.R.C. 153.

Now then, having established the competitive rate as the test of the reasonableness of the rate at the intermediate point, one would be immediately in difficulty because although the Board might grant the relief under Subsection (1) it must almost inevitably give to the intermediate point a rate not higher than and probably somewhat lower than the competitive rate to the more distant point. If this is done, the test of reasonableness of rates to other points not intermediate would then come under review and the same test of reasonableness somewhat vicariously, it is true, must then be applied to the rates to other points. If that is done, the whole rate structure breaks down to the level of competitive rates. What more absurd result could be contemplated and what more destructive idea could be introduced?

I submit the views I have just expressed are not affected by Alberta's withdrawal of 314A (3).

The fourth subsection of Section 314A is procedural and with the literally thousands of cases that would have to be dealt with, I submit that the burden of meeting the requirements of this section is a tremendous one.

THE CHAIRMAN: That one that was withdrawn, what was it about? Discriminatory rates? I think it was.

MR SINCLAIR: No, it had to do with "without affecting other origins or destinations", and at first I had quite an argument on that, but when your Commission was discussing it with Mr. Frawley they pointed up some of the difficulties that were implicit in it, and he withdrew it. It said that no competitive rate would be allowed or no departure from a long and short haul rule would be allowed unless you would take into account its effect on other origins and destinations. That is my recollection

of it. It was a vicious thing, and he withdrew it.

In dealing with the proposed legislation regarding long and short haul departures, I think it most important to consider whether there is any necessity for changing the existing legislation. If the railways could not secure departures from the long and short haul rule they would have only two alternatives -- abandon the competitive traffic or suffer the loss in revenue of blanketing back the competitive rate and the loss of revenue that would arise from demands for proportionate reductions even beyond the area to which the competitive rate would be blanketed, and attempt to make up the loss in revenue that they suffered by increasing other rates.

I submit that the necessity for legislation is not proved by merely filing a brief of some two hundred pages as was done by Alberta and by referring to the fact that in the United States there is legislation requiring the railways to accept the onus and establish the justification for departures from the long and short haul rule. The problem of regulating railways in the United States is, as has been said many times during these proceedings, much more complex than it is in Canada. In the United States it must be remembered that competing transportation agencies, both water and truck, are subject to a much greater degree of regulation, and there is a basic difference in regard to the national policy on water transportation.

THE CHAIRMAN: Would you say that that expression of policy by Congress---

MR SINCLAIR: Has a tremendous effect.

THE CHAIRMAN: .---to maintain water transportation as well as rail, has any effect?

MR SINCLAIR: Has a tremendous effect, and I am

going to deal with that.

THE CHAIRMAN: On relief from this subsection?

MR SINCLAIR: Yes; it makes it, I say, practically impossible to get a fourth section departure granted by the Interstate Commerce Commission on transcontinental rates.

THE CHAIRMAN: You are dealing with that now.

MR SINCLAIR: Yes, I am. Mr. Frawley challenged our statement, and he referred to two cases, and I would like to discuss them thoroughly with you, but after looking at them I say that they are completely off the point, but I will try to get through them as quickly as I can.

You will recall that Mr. Frawley (Vol. 122, pp. 22055-58) referred to Mr. Jefferson's evidence that the Interstate Commerce Commission in dealing with applications of the railways for departures from the long and short haul rule had to take into account the policy of Congress to protect intercoastal shipping. Mr. Frawley went on to consider two recent cases of the Interstate Commerce Commission which he put forward as disproving Mr. Jefferson's statement. Now I say that a reading of the Interstate Commerce Commission decisions makes it very clear that the statement made by Mr. Jefferson is undoubtedly correct. It is difficult for railways to secure departures from the long and short haul rule on transcontinental traffic because of the United States National Policy on intercoastal shipping.

Before dealing with the two cases Mr. Frawley cited, I wish to refer you to: Reduced Rates on Commodities from Originating Territory West of Indiana State Line to Pacific Coast Terminals (1926) 107 I.C.C. 421. The Commission denied the railways application for relief. After quoting from Section 500 of the Transportation Act, 1920,

said at page 439:-

"It is strongly urged, therefore, that to permit the western carriers to publish the proposed rates from Chicago for the avowed purpose of depriving the water lines of a substantial portion of such traffic as they are now able to obtain would be to disregard wholly the policy of Congress to promote, encourage, and develop water transportation. To be of material benefit to the rail carriers a substantial portion of this tonnage must be diverted to their lines. The declared policy of Congress is to foster and preserve in full vigor both rail and water transportation."

and further at page 439:-

"It is evident, therefore, that the diversion of any substantial tonnage from the water lines would have but an inappreciable effect on the net revenues of the rail carriers. On the other hand, it might very seriously impair the ability of the water lines to maintain their present standard of service."

You will recollect, of course, my lord and members of the Commission, that most of our intercoastal shipping is done by British tramps. They do a circuit; they come into Vancouver and they work through from Vancouver into the ports of Montreal or Saint John, and then they work grain out of there or other cargo to England, and back they come again. Of course, in the United States, with the Jones Act, you have to have American bottoms; they are the only people that are allowed to engage in inter-coastal or intracoastal shipping.

See also the opinion of Commissioner Lewis at page 441, Commissioner Woodlock at page 442.

The difference between Canada and the United States is this: in Canada the railways meet competition by

putting in rates to forestall it. In the United States the railways are not permitted to depress transcontinental rates to forestall or eliminate intercoastal water competition.

The two cases referred to by Mr. Frawley were Citrus Fruits from Florida to North Atlantic Ports, 266 I.C.C. 627 and All Rail Commodity Rates between California, Oregon and Washington, 268 I.C.C. 515. Both these cases arose when water lines and the Maritime Commission urged upon the Interstate Commerce Commission increasing railways rates so that water carriers whose costs had materially increased could increase their rates to meet increased costs and still retain the business. The Commission clearly pointed out at page 520 of the All Rail Commodity Rates Case that Section 500 of the Transportation Act of 1920 does not require the Commission to take this action. In other words, they do not say you have to put up rail rates because another competing agency's costs had gone up. I submit that nothing could be clearer that the difference involved in increasing rail rates above the level at which they had been established to enable the water carrier to secure business and refusing a rail carrier Fourth Section relief when it puts in a low rate to meet existing water competition. They are the antithesis of one another.

The close attention that Canadian Pacific gives to competitive rates was made clear by Mr. Jefferson. The policy of Canadian Pacific is to obtain the highest rates possible on competitive traffic and still retain the business. How their compensatory nature is tested was also made clear by him and I think it is of considerable significance that the witnesses from Alberta (Volume 60, Pages 11543-4; Volume 61, Pages 12042-3) could not suggest any test which could be practically applied other than the

tests that Mr. Jefferson informed the Commission were those used by Canadian Pacific.

The proposals made in connection with the long and short haul rule are, I submit, unworkable. Even if workable legislation was drafted, if the onus of establishing in advance the necessity for departure was placed upon the railways this, I submit, would only result in increasing railway expenses materially without any benefit to anyone. Surely before rigid and restrictive legislation such as what is proposed is recommended, your Commission would require some evidence of injury being sustained.

As pointed out by Mr. Jefferson at Volume 77, Page 15498 and at Page 15505, any legislation as proposed by Mr. Frawley would be detrimental rather than beneficial to the shippers and receivers in Canada and would be opposed by industry in general throughout the country.

I repeat that every time the Board has dealt with the complaints of Alberta they held that they were not impressive complaints. I spent some considerable time when Mr. Harries was giving evidence, in asking him to give instances of how the present long and short haul departures were injuriously affecting Alberta. Mr. Harries stated that long and short haul departures injuriously affected Alberta in either a relative or absolute sense. In the absolute sense, Mr. Harries admitted injury would only be occasioned to Alberta if the rate to the competitive point was too low. At Volume 62, page 12092, the following occurred:

"Q. Under your absolute example, that would be where the intermediate rate was higher than the destination?

A. That is correct.

Q. And that is the only example that you have

of the injurious effect of the long and short haul principle in the absolute sense?

A. Yes.

Q. Now, to injuriously affect Alberta would be the result in the absolute sense, of the railways having not used good business judgment in fixing their competitive rates, that is correct, is it not?

A. They might have put a rate in that is too low. "

Now, I say, with all respect to Mr. Frawley, there is one part of his case, and we say that he can suggest nothing additional to what we do to see that the rates are not too low, and yet that is what his case is based on.

In discussing injury in the relative sense, Mr. Harries referred to the back haul to Alberta to take advantage of the transcontinental rates and to the possibility of injury arising from departures from the long and short haul rule through the railways meeting market competition. We have, I submit, made it clear that Alberta is not injuriously affected by what they term the back haul, because the combination is always protected where it makes lower charges than the single factor rate to Alberta. In fact, Alberta is receiving some benefit by applying the combination as the maximum to the intermediate point.

We have had no evidence to show that there is any injury being suffered by Alberta producers on account of long and short haul departures arising from applying competitive rates to meet market competition.

In regard to market competition the policy of Canadian Pacific Traffic Officers is clear. Rates are published to meet market competition only if the competition

arises from a foreign country. That is to say Canadian Pacific Traffic Officers do not publish competitive rates to give one Canadian shipper an advantage over another. In other words, long and short haul departures are not practised in Canada on account of market competition within Canada. Dr. Locklin (Vol. 62, p. 13103-4) while stating he objected to railways meeting marketing competition within one country admitted different principles would apply in meeting foreign market competition.

THE CHAIRMAN: Mr. Sinclair, at the bottom of page 90 you say:

"We have had no evidence to show that there is any injury being suffered by Alberta producers on account of long and short haul departures . . ."
Could you tell us anything---

MR SINCLAIR: I will put in "and consumers".

THE CHAIRMAN: Can you tell us anything about Alberta distributors?

MR SINCLAIR: I say also that they cannot possibly be injured, because, as I said earlier in my argument, my lord, say we have not got a transcontinental competitive rate, the traffic can still go into Vancouver from Eastern Canada by water at a lower rate than it goes in if it goes in by rail. The Vancouver distributor, therefore, not having anything to do with the railways, can get into the Alberta market as a distributor against the Calgary distributor, if the Calgary distributor does not avail himself of what is open to him and what Munsen-Clark is asking him to do, that is, to take advantage of the water rate from the east to Vancouver and then ship by rail to his distributing centre in Alberta. How can he be suffering? How can he be injured? He has got the control of the situation right in his own hands as to how

he routes the traffic, just exactly the same way as the Vancouver distributor.

COMMISSIONER INNIS: Does not this assume that the railways are to some extent protective in their own -- that is to say, they are taking on a protectionist function. In the paragraph you have just referred to:

"Rates are published to meet market competition only if the competition arises from a foreign country."

MR SINCLAIR: That is right. I say the fastest way, Dr. Innis, to start a rate war between railways is to have the Canadian National helping a shipper on their line get into this market, and my fellow, being a little shorter distance from that market---

COMMISSIONER INNIS: I am not complaining about that. What I am asking is whether you are not taking upon yourselves something of the protective function so far as tariffs are concerned against outside competition.

MR SINCLAIR: No, sir. The only reason why we publish those rates to meet market competition from overseas is to enable the traffic to move by rail; otherwise we would not get the traffic. For instance, we will say bottles from California versus bottles from Medicine Hat -- that is an existing case. Those bottles from California---

THE CHAIRMAN: Do you say bottles?

MR SINCLAIR: Bottles, yes. They bottle quite a bit of whiskey out on the coast, and a lot of bottles move in there -- Harwood's.

THE CHAIRMAN: Are they empty both ways?

MR SINCLAIR: No. A lot of loads come out of Vancouver; we get a lot of traffic out of Marpole, both Canadian and American. But if we did not publish those market competitive rates on bottles we would then have all the bottles being used coming up from the United States, and

we would not be getting traffic on them at all. The point that I wish to make is that we are not being protective, we are just using good business to get some remunerative traffic for the railways, and in our own view, as we go after it.

THE CHAIRMAN: Well, suppose you had to adjust your rates so that you lost that competitive traffic, what would be the result on your revenue?

MR SINCLAIR: Well, we would lose a very remunerative section of our traffic; we would therefore have to put our other rates higher. Now, that is the only result there could be. We get a long haul on this stuff, we get heavy loadings, we get up to 70,000-pound minimums, and we get long haul; that is where we make our money. We would have to forego that or else take the diminution of revenue that flows from blanketing it back in proportional reductions beyond, and that would mean the other rates would have to go up.

THE CHAIRMAN: Well, is there now or is there the prospect of enough water competition to hurt you so seriously as all that? I mean, what does experience show?

MR SINCLAIR: Well, it shows that we had a lid on it, and because our costs were going up---

THE CHAIRMAN: You raise the lid and they flow in.

MR SINCLAIR: And they are starting to come in, and come in fast. When you find an organization as aggressive as Munsen-Clark advising shippers that they are sorry, that they had too much traffic for one of their ships, that gets around, and another ship operator will come in there, and then another, and then another, and then they will get frequency of service and faster ships. It does not apply only east to west, it is applying west to east. The H. R. McMillan Company, for instance, are putting on

their own ships.

THE CHAIRMAN: Those are Canadian shipping companies, are they?

MR SINCLAIR: But they use British tramps. There are some of them that use Canadian bottoms, but there is a surplusage, as you know, right at the present time of Canadian tonnage, but it is not in the market, because of the cost.

THE CHAIRMAN: All-the-year-round ships, to Saint John and Halifax?

MR SINCLAIR: Oh, yes, Munsen-Clark ship from the Maritimes in the winter time. But we are able to keep the lid on this thing. We watch it very, very carefully. It is a matter of tremendous concern. There is not a single move that is made on transcontinental traffic that does not get right to the Vice-President of Traffic of the Canadian Pacific.

THE CHAIRMAN: So you are not only meeting competition, you are forestalling it.

MR SINCLAIR: Absolutely.

Mr. Frawley, Volume 122, Page 21984, stated that information given by Mr. Jefferson with respect to publishing rates to meet market competition between the Canadian railways is incorrect, and he refers to tolls on salt from Lindbergh, Alberta to Saskatchewan points and Canadian Pacific tolls on coal from Southern Alberta to Pacific Coast as examples of long and short haul departures due to market competition between Canadian railways. Lindbergh is a local shipping point on the Canadian National Railways and I am not in a position, therefore, to argue as to the measure of rates applicable from that point. I do, however, take issue with Mr. Frawley in saying that the information given by Mr. Jefferson is incorrect by referring to coal from Southern

Alberta to the Pacific Coast.

The rates on coal from Southern Alberta mines to Pacific Coast points published in Canadian Pacific Tariff C.T.C. No. W. 4029, where they are shown as competitive rates and not applicable to intermediate points were established to permit the Alberta mines to compete with coal from Vancouver Island, handled to Vancouver by scow where no rail haul is involved. It would be interesting to know if Mr. Frawley is objecting to the Alberta mines being enabled by the railways to meet the competition of water borne coal into the Vancouver market.

The extent to which Mr. Frawley is driven to find examples to support his position and the effect it would have on Alberta industry is absolutely stupendous, and I say they do not support it.

The position of Alberta on the matter of the long and short haul rule is, I think, summed up in a question and answer at p. 12094 of Vol. 62 of the transcript:

"Q. So there may be a problem before the Commission in which there is no injury to Alberta at all, that you have in your Brief. A Problem that you set out in your Brief that has resulted in no injury to Alberta at all?

A. There may be a case in which there is no unwarranted injury, but I think when there is a relative and an absolute difference, she would be at a disadvantage."

Now, there is the whole case of Alberta in a nutshell.

That Alberta, by not having watercompetition, is at a disadvantage in that respect alone would appear obvious but this would be a geographic disadvantage which would be more than offset in the case of Alberta at least by

geographic advantages. The question of weighing geographic advantages and disadvantages has been dealt with by Mr. Evans.

I submit that under the present legislation no one is hurt. On the contrary, the lower competitive rates for the longer hauls, particularly the Transcontinental competitive rates, tend actually to benefit the intermediate higher rated points because such lower rates for the longer hauls enables the railways to secure traffic which they would not otherwise secure at rates yielding some profit, and thus have a general tendency to hold down the whole rate structure. The railways, I submit, in the public interest should be free from all unnecessary fetters.

There is no evidence which shows any necessity for amending the existing legislation on the long and short haul rule, and my submission is that your recommendations should not contain any recommendation regarding any change in the existing legislation in this regard.

My next subject is interline rates, and the point in that is this: When Alberta's witness was on the stand -- this part of Alberta's submission was handled by Mr. Darling -- he agreed that this was not a matter for statutory treatment. He had studied the problem, and he admitted that the present powers of the Board were adequate. Now, he wanted to have single factor rates apply to interline.

THE CHAIRMAN: What do you call them?

A. Single factor, straight mileage without any plus factor; and he used the American rates as examples. Now, I have put in here why the American rates cannot be used as an example. But the amazing thing was that when you put some questions, my lord, to Mr. Frawley during his argument, I just could not believe my ears; Mr. Frawley said, yes, that

he was going to draft something.

THE CHAIRMAN: Was the amazement caused by my questions or by his answers?

MR SINCLAIR: His answers. No, I thought your questions were very much to the point, my lord. But the thing that amazed me was the somersaults Mr. Frawley went through, because all of a sudden he realized that one of his witnesses, which he must have forgotten, said he did not need any change in the Act, and then you point that out to him and he says, "Well, that can't be right; we want changes in everything; we will put one in here." Now, I have not seen his amendment, but it is going to be some amendment, because his own witness and any person who has tackled it says it is too complicated for statutory treatment.

THE CHAIRMAN: Under this heading of "Interline Rates" do you include this request of Mr. Frawley's about farm implements, for instance, coming in from the United States and not receiving distributing rates from the border in?

MR SINCLAIR: Well, that point will be met with under our equalization proposal.

THE CHAIRMAN: Under another heading?

MR SINCLAIR: Yes. That was where we applied standard mileage rates from border gateways, but if our equalization pattern is accepted we will have a distributing clause pattern that will be applicable between any two points in Canada, and that will take care of that situation.

THE CHAIRMAN: You are dealing with it?

MR SINCLAIR: No, I have already dealt with it. That was dealt with under my equalization part.

Now, Development Rates: Here again we had a proposal from Alberta and an amendment, and I deal with

that at page 101 of my notes of argument. I say that the result of Alberta's amendment can be summed up in this way: What Alberta is asking is that by statute preferential rates should be given. Now, the position of Canadian Pacific is this, that we must have compensatory rates from the outset. That is made clear from an extract from the transcript that I quote and a discussion that took place between you, my lord, and both Dr. Angus and Dr. Innis, when Mr. Jefferson was on the stand. But the effect of Alberta's amendment would be to make statutory preferential rates. Now, surely that is certainly a retrograde step in connection with an equitable and reasonable freight rate structure.

My further arguments are set out in my notes.

Expiry Rates: I have dealt with them at pages 102 to 104. I say to require the approval of the Board prior to allowing an Expiry rate to expire, as has been suggested in a number of submissions to your Commission, would unduly hamper the R ilways in maintaining a proper and necessary flexibility in the making of rates.

I also say that we had some difficulty with those seed grain rates, but after the trouble we have had I think this Commission can rest assured that that situation will not crop up again.

Now, International Rates: I spent quite a bit of time on these in my notes. I think that I have gathered together the various arguments and submissions that we wish to make. Here again, Alberta has under the heading of "International Rates" proposed an amendment which has to do with overhead traffic. I deal with that. I say that what Alberta is trying to do is force a Canadian railway to apply a competitive factor existing in the United States to conditions that do not exist in Canada.

THE CHAIRMAN: Just where is that?

MR SINCLAIR: That is dealt with in my notes of argument at pages 110 and 111. The reason why I am---

THE CHAIRMAN: Is that a proposed amendment to section 338 or a new one?

MR SINCLAIR: It is a proposed amendment to section 338, my lord. He proposes adding a new subsection, and the only example he could find -- and he has been looking for these things for a good many years -- was the famous instance of Essex County, where he found some canned goods going out to Alberta through Sweet Grass, where by using some competitive rates in the United States, or some factors, I should say, intermediate factors in the United States, by combinations he could make lower than the through rate, and he blames the Canadian railways for protecting themselves against the use of combinations of intermediates through a foreign country, of breaking down their through rates, and he says we have that in the United States tariffs to protect us. Well, certainly we have, and why shouldn't we:? And why should Alberta, because American railroads are compelled to put in depressed rates for conditions that exist down there, why should that inure to the advantage of Alberta and to the detriment of the railways' revenues and to the detriment of all other shippers in Canada? I say it is untenable.

Export and Import Rates: I deal with that on pages 112 and following to 115. You will recall that you drew the attention of Mr. Frawley to the fact that his mandatory equalization was going to prevent export and import rates being at a lower basis than domestic rates. He recognized that, and said he was going to look after that, but it just points up the very fact of which we are

complaining, that here are people trying to put forth amendments to the Railway Act, and they are going to upset a whole rate structure that has stood the test of time and enabled Canada to prosper and industries to flourish.

The next point I deal with is Agreed Charges, and I cover that rather fully, and at page 121 I sum it up in this way:

The views of Canadian Pacific can be summed up in this way -- Parliament, after very full consideration, recognized the necessity of giving to the Railways a method to meet unregulated competition. Unregulated competition has increased rather than decreased since the Agreed Charge provisions of the Transport Act were enacted in 1938. The two major railways in Canada have from eight to nine million dollars annually of revenue involved in Agreed Charges. This traffic is profitable traffic, as the provisions of the Act make it necessary for the Railways to prove that their net revenue position will be improved by the Agreed Charge.

Now, you will recall that Manitoba took the position that we could get all the advantages and everything we required by competitive rate. Well, that is sheer utter nonsense, because the Act itself says that if you can meet it by a competitive rate, then you cannot put in an agreed charge.

THE CHAIRMAN: Where does the Act say that?

MR SINCLAIR: It says that in section 35(1) of the Transport Act.

THE CHAIRMAN: You are at Agreed Charges, are you?

MR SINCLAIR: I am at Agreed Charges, yes. I admit I am going at quite a clip here.

THE CHAIRMAN: What section did you say?

MR SINCLAIR: Section 35(1), my lord.

Now, here comes Manitoba, and they are supposed to have given this matter study, and they make a statement like that -- amazing, I say, that is all it is.

Now, the last of the three subjects I had assigned to me was the National Transportation Policy, and my notes on that run from page 121 to page 132. In a word, I say that the National Transportation Policy for Canada should be a policy that will enable us to provide low cost efficient transportation service, and that is the policy that should motivate legislation in regard to other competing modes of transport, and should also be the motivating consideration in considering the legislation that has been proposed by the various parties before you.

My time is up now, my lord, and I thank you for your patience in listening to me for so long.

(Recess)

(Portion of argument taken as read follows):

INTERLINE RATES

On this subject the written submissions of Canadian Pacific will be found in Part II, pp. 83-94. Mr. Jefferson's evidence is at : Vol. 76, pp. 15410-40; Vol. 81, pp. 16079-109, pp. 16118-120; Vol. 84, pp. 16500-02.

The Board, under existing legislation, has complete jurisdiction over the matter of Interline rates. Where Interline rates are necessary, railways place them in effect. As Mr. Jefferson said at page 15410, Vol. 76:-

"The Railways have been very much alive to the matter of Interline rates. We have a great number of them in both Eastern Canada and Western Canada. Interline rates are published between points in

Eastern Canada on the one hand and points in Western Canada on the other, via North Bay or Port Arthur - Fort William. The railways establish joint interline rates wherever there is necessity for them. This is the policy of the Railways."

Sections 336 (1) and 337 (1) of the Act deal with the Board's jurisdiction on this matter. Section 336 (1) requires the Railways to publish joint tariffs where they are necessary. Section 337 (1) allows the Board to prescribe joint tariffs and the tolls under such tariffs if the Railways fail to agree. The Board's jurisdiction is, I submit, extremely broad and enables it to adequately protect the public interest.

It is important to remember that a railway is not required to publish a joint tariff with another railway, even though, by using a two-line haul, a shorter distance between two given points may be brought about. If one carrier has a route which is reasonable and practicable, joint tariffs are not required. (Joint Rates, 1916, 6 J.O.R. & R. 406).

Admittedly, there are not joint tariffs between all points in Canada, even where only one railway exclusively serves either the originating or destination point. Canadian Pacific submits that the covering of all points by joint tariffs, as suggested by Saskatchewan Federated Co-op (Vol. 7, pp. 1257-8), would be unnecessary. The effect of any such requirement would not be in the public interest. The result would be, as stated at page 94 of Part II of our Submission:-

" . . . the expenditure of large amounts of money and materials necessary for the construction of interchange facilities at many additional points; the additional operating costs that would result in

most instances; and the expense of tariff publication required to establish joint through rates between every two stations in Canada would, in the opinion of Canadian Pacific, greatly outweigh any possible saving to the shipping public through the medium of lower freight rates which might result in certain instances. In the final analysis, the position of the general shipping public and that of the Railways would be impaired rather than be improved."

Where Interline rates are necessary, they are on the basis of single line rates with appropriate additions to cover the extra costs inherent in the handling of interline traffic.

There is an exception on rates to and from the N.A.R., where the one line basis is used. This is because both the Canadian Pacific and Canadian National look upon the N.A.R. as a mere extension of their own line. In the case of the D.A.R., which is a leased line, there cannot be any interchange with the Canadian Pacific except by a transfer of lading or without a transfer of lading using the Canadian National lines as a connection and so, therefore, there is an addition over the single line mileage on through tariffs. Where railways, parts of the Canadian Pacific system, maintain their separate identity, even though they are leased lines and directly connect with the lines of the parent company, the policy has been not to extend a single line mileage rate, but to give joint rates where they are necessary and apply an addition over the single line mileage. In the case of the Quebec Central Railway, single line rates have been an open question for many years. If single line rates were applied from all points on the Q.C.R., there would be a serious loss of revenue. The investment in the Q.C.R. is largely that of other interests than the Canadian Pacific

and the earnings on the traffic moving over that railway are not, even under the present system of making rates, sufficient to cover the obligation which the Canadian Pacific has assumed by leasing it. I might point out that informed shippers are cognizant of the situation on the Q.C.R. and D.A.R. because railway officers have discussed the matter with them on numerous occasions. I would also point out that it is not without significance that no shipper or consignee using these railways has appeared before your Commission to complain of unjust treatment under present conditions.

Alberta, which made the most extensive representations on the subject of Interline rates, recommended that such rates should be calculated on through mileage over the shortest route over which carload traffic can be interchanged. (Vol. 63, p. 13247).

If Alberta's proposal were accepted it would mean that there would not be additions to the single line rates in establishing joint through rates. Unquestionably, there are additional costs in establishing and moving traffic through interchange points and publishing joint rates. This was recognized by the Board in *Canadian Northern Ry. v. G.T.R. Co.*, 20 C.R.C. 84.

Canadian Pacific submits that it is only reasonable to have an addition on Interline rates over and above single factor rates. Alberta, in their submission, referred to the situation in the United States where, they contend, Interline rates are published on the single line basis. It is the practice of the Interstate Commerce Commission to prescribe class and commodity rates for either single or joint line hauls on the same basis.

I submit that the United States practice does not support Mr. Frawley's contention of having interline rates

on a single haul basis. In Vol. 122, pp. 22067-8 Mr. Frawley referred to Southern Class Rate Investigation 100 I.C.C. 533 to show, he said, that in the United States two line hauls were on a single line basis. I merely point out that the ultimate finding of the Commission, which can be found at page 22068 of the transcript, clearly shows that the additional costs of two line hauls in the Southern Class Rate case were to be reflected in the "distance scale".

The reason the Interstate Commerce Commission have prescribed, in so many cases, multiple hauls on a single line basis is because their whole rate structure has taken into account the transportation system existing in that country, with the numerous railroads that are operating. Mr. Jefferson made this clear at Vol. 76, pp. 15435-36, when he said:-

"The rates prescribed by the Interstate Commerce Commission, however, are not single line rates extended for multiple hauls; as suggested by Alberta for application within Canada. For a great many years the Interstate Commerce Commission, in making rates in the United States, have based them on the fact that they have, in that country, a transportation system which consists largely of multiple hauls."

Mr. Jefferson went on to point out, with the large number of interline routes that are available in the United States for moving traffic, the only practical way to deal with the situation is to reflect this situation in the rate structure whether for single or multiple hauls, because it would be out of the question to add an arbitrary over a single line rate via the multiple routes.

The extent of multiple routes and interline

hauls in the United States can be seen from the following extract of the Interstate Commerce Commission decision in Re: Section 5(a) Application No. 3, Eastern Railroads - Agreements which was decided on March 15th, 1950, at page 7 of the mimeographed report it is stated:-

"For example, the Erie Railroad is a party to 114 different routes between New York, N.Y., and St. Louis, Mo., participated in by a total of 26 railroads. Any proposed rate adjustment between New York and St. Louis would require consultation with or among all of the participating railroads. There are also single-line routes between those points. A large percentage of the traffic in official territory is interline traffic moving under joint rates, amounting to 75 percent for the Erie, 76 percent for the Baltimore and Ohio, 82 percent for the New York Central, 68 percent for the Pennsylvania, 93 percent for the Boston & Maine, and 87 percent for the Maine Central, as examples."

I wish to stress that the matter of Interline rates is one of some complexity and, by its very nature, broad discretion must be left to the Railways in the first instance and, failing action by them where necessary, discretion as to what is to be done must be left to the Board. Interline rates depend on so many factors that each individual case and the facts surrounding it are of the utmost importance, and a general rule which would be rigidly employed could not be set down without making so many exceptions as to make the rule unworkable. That the legislation now in existence is adequate and sound for Canada and that the problems of trying to rigidly set down an Interline rule are practically insurmountable has been recognized by Alberta in its submission to this Commission.

Alberta made it clear that they were not asking your Commission to recommend any changes in the Statute (Vol. 63, p. 13247). In view of this it was with considerable surprise, therefore, that I heard Mr. Frawley in his argument (Vol. 122, pp. 22072-74) change his position and suggest he wanted the Railway Act amended.

The Maritime Transportation Commission has proposed an amendment to Section 9 of the Maritime Freight Rates Act by the addition of a subsection which would be numbered 9(6). This amendment would enable traffic to be routed with the Maritime statutory preference over routes which existed prior to the Act coming into force. As the Act is presently framed, traffic routed via the Saint John Gateway over which considerable traffic moved prior to 1927 is effectively closed for many movements. Canadian Pacific considers this suggested amendment reasonable and has no objection to it.

DEVELOPMENT RATES.

Mr. Jefferson's evidence may be found at Vol. 79, 15751-pp/ 15753; Vol. 80, pp. 15918-28; Vol. 82, pp. 16226-28.

The Freight Traffic Department of Canadian Pacific has attached to it an Industrial Development Section, with officers both in Canada and England. The work of this Development Section is to advise industry as to the source of raw materials, markets, plant sites and trackage and siding facilities. There are really two phases of this work. Plant sites, trackage and siding facility matters are handled by one section, staffed by officers with Traffic and Operating experience. The other section deals with location of raw materials and markets. This latter section is staffed by geologists and industrial engineers.

The Freight Traffic Department also has the assistance of the Research Department in making analyses and

field studies where required to determine what rate the railway can afford to give to new industry or an industry developing a new line of traffic. It is fundamental to the system of rate-making that the Canadian Pacific will not quote a rate unless it is compensatory. How much the rate quoted is above out-of-pocket costs depends on negotiation between the Traffic officers and the industry involved and resolves itself into what the traffic will bear. The position of the Railways is that, to have a realistic rate structure, you cannot put in rates that do not immediately return at least something in addition to the out-of-pocket costs. This is made clear in Volume 82, p. 16227:-

"THE CHAIRMAN: Q. Can we say this, that every rate that you set must be compensatory from the outset?

MR JEFFERSON: A. As far as I can determine it, yes, sir.

Q. As far as you can make it compensatory?

A. Yes, sir.

COMMISSIONER INNIS: Q. You would not consider compensatoriness extending over a period of a year?

A. No, sir, I will answer you this way, that if a rate might not be as compensatory as I would like it, we will say, but still something that, to the best of my ability to determine, was above out-of-pocket costs, and as long as we were going to make something, I might be satisfied with that rate for a year or two and get something higher later on, but the difficulty in doing business that way is that once the railway puts in a rate to help an industry in that way, and to expire in a year or two years, then the industry is always after you to extend it, and you never can

" get it up. That is the trouble.

Q. Yes, I can understand that, but it seems to me this is a very important question.

A. Yes, sir.

Q. And it points rather to the interest of the railway in immediate revenue rather than terms of long run traffic development?

A. Yes, sir, but I mean to say that I do not think the railways can make rates that way, and not feel satisfied they are going to make some return when they make the rate.

COMMISSIONER ANGUS: Q. Are you a little afraid that the Board might not let you reap where you have sown?

A. They might not. Then again if we make a rate and it expires the industry might take us to the Board -

Q. I do not mean a particular industry. I mean if your general level of return was rigidly controlled. If you gave developmental rates in view of later traffic you might never be able to raise that traffic to the general level.

A. They might say you throw away too much money here and we are not going to give it to you somewhere else. They might think you were a little too generous in some quarters."

In dealing with rates to assist industry, which are referred to as Development rates, the Railways must be most careful to ascertain how the proposed rate would fit in with existing rates moving the same or similar commodities in other parts of the country.

In considering rates for new industry, one

question is the market to be served. If another Canadian industry is already serving the market the rate granted to a new industry at a different location would have to bear a proper relationship to the existing rate. If this were not so, a claim of unjust discrimination would be immediately made by the existing industry. If the Act were changed to permit reduced rates to assist the development of new industries without infringing the discrimination sections of the Act, the effect would be to give preferential treatment to the new industries, which is contrary to sound rate-making principles and, I submit, to sound business development. If the new industry to which special low rates were to be granted was not serving a market already served by another Canadian industry, the rates granted to the new industry would have to bear some relationship to the rates already established in another territory or the established industry could by comparison, claim that its rates were unreasonably high unless the railways could show differing operating or traffic conditions. If an established industry can pay the going level of rates on a given commodity it would require compelling reasons to show why a new industry could not pay that same level of rates.

The Board of Transport Commissioners, under the existing Act, do not initiate Development rates. They are initiated following conferences between the Railways and prospective shippers. If the rate put into effect by the Railways is not unjustly discriminatory or unreasonably low, the Board would approve the rate, even if a complaint were made. The manner in which Railways presently treat Development rates is that the rate structure is not, and should not be made, a vehicle for planning industrial development if, in doing so, injury will be caused to

existing industries shipping the same or similar products, or the revenue needs of the railways not given full recognition.

Alberta has proposed a new Section, No. 329A (3) on this subject. Canadian Pacific is opposed to the proposed legislation, because it would permit preferential rates to new industries and the imposition of unjustly discriminatory rates on existing industries and cause industrial dislocation and wasteful transportation services. Under the proposed legislation the revenue position of the Railways would also be adversely affected, because a new industry would claim that the new Section gave them a right to a preferred rate whether actually needed or not. If the new industry was on one railway and the established industry was on another railway, the established industry to protect its market and the railway which serves it to protect its traffic, would be forced to meet the preferred rate, with the result that the new industry would not secure preferential treatment but the Railways would be granting rates lower than necessary to both the old and the new industries. This would be a clear example of the uneconomic effect of market competition within Canada. The proviso of limiting to three years, without the approval of the Board, preferred rates to new industry and the giving of the Railways the right to cancel the rate at any time does not answer, I submit, the objections to the proposed legislation.

Mr. Jefferson, in the evidence I quoted earlier in my discussion of this subject, pointed out the difficulty of taking out low rates extended to develop industry. I think that nothing has been made clearer during your Commission's hearings than the fact that while industry seems to be able to afford increases in other expenses such

as labour and materials, it would appear that they can least afford an equitable increase in freight charges. The granting of special rates quickly leads to the claim that the industry has a vested interest in the low rate, and a demand that the low rate be continued. This demand, Traffic officers of a public service utility or the regulatory Board, would find very hard to overcome.

(Page 23725 follows)

EXPIRY RATES.

Railways publish special rates to meet certain circumstances or conditions, and such rates are operative only for a specified time, unless sooner cancelled, changed or extended. The expiry date is specified in the tariff after which date the normal class or commodity rate applies.

Expiry rates have been used by Canadian railways to meet two very dissimilar situations. The most common use of Expiry rates is to meet water or truck competition that is not existent throughout the year. In the case of rates put in to meet water competition, for example, they apply from the 15th of April until the end of November, during the open season of navigation. If the navigation season remains open for an extra two weeks the expiry date can quite easily be extended. In this way, flexibility is given to the rate structure.

The other condition for which they have been used is to give a concession to particular traffic. Examples of this type of Expiry rates are found in the special existing rates on Alberta coal to Ontario points and the former special rates on Seed Grain.

In the case of the special rate on Alberta coal, when it was instituted there was some doubt that it was a compensatory rate. Owing to changed conditions, however, there is no doubt whatever that the rate is non-compensatory and I should say that the Railways are now attempting to have these coal rates put on a proper basis, and a recent tariff has extended these rates to the end of June only, rather than the full year's extension as has been the normal course. It is interesting to note that Alberta

(Vol. 70, p. 14403) said that if the rates were non-compensatory they should be raised. The reason for the short extension is to enable the negotiations that are now under way to be completed.

The special Seed Grain rates were in effect for for a short period during each year for many years. It may well be questionable as to whether these special rates were compensatory when first instituted in 1915. In any event, the Railways, by giving voluntary extensions down until last year, did extend these rates at a time when they were non-compensatory. Like a number of other instances, it is an example of the Railways extending concessions to agriculture when they, on account of revenues, felt they could afford to do so, or on account of their view that to raise the rates to a proper level might have had a detrimental effect on agriculture.

The impact of rising costs resulted in depressed rates being under review at the time all rates were frozen under Wartime Prices & Trade Board Order No. 92. When this order was cancelled in 1947, steps were again taken to review all low rates and, as a result, after very careful consideration, the Traffic officers took out the special rates on Seed Grain which were based on only 50% of the normal commodity mileage scale. The action of the Provinces in demanding that all low rates be raised before any general increases were authorized by the Board gave further impetus to the proposals of Railway Traffic officers to raise all low rates. I think it can be taken for granted that, after the trouble Railway Traffic officers have had with long extensions of expiry rates, your Commission can be assured that

a situation similar to that which developed in the Seed Grain rates will not recur.

To require the approval of the Board prior to allowing an expiry rate to expire, as has been suggested in a number of submissions to your Commission, would unduly hamper the Railways in maintaining a proper and necessary flexibility in the making of rates.

INTERNATIONAL RATES.

The written submissions of Canadian Pacific are at pp. 101-108 of Part I. Mr. Jefferson's evidence is at Vol. 74, pp. 15045-99; Vol. 81, pp. 16191-93; Vol. 84, pp. 16502-28; pp. 16584-86.

Strictly, the subject of international rates covers traffic moving between points in Canada on the one hand and points in the United States on the other.

Related to this matter but not, strictly speaking, international rates, are the so-called overhead traffic movements which cover movements between Canadian points or between American points passing through either the United States or Canada.

Mr. Frawley has proposed an amendment to Section 338 by adding a subsection which has to do with overhead traffic between points in Canada. I will discuss this later.

First I wish to discuss international rates, strictly so-called. Under Sections 338 and 339 of the Railway Act, the Board requires the filing of any joint tariff of rates covering movements to or from Canada and originating or destined in Canada. Similar jurisdiction is given to the Interstate Commerce Commission under Section 6 of the Interstate Commerce Act.

While the Railway Act requires a joint through tariff in which a Canadian carrier participates to be filed with

to be filed with the Board, it cannot control the rate designated in that tariff except to order the Canadian carrier to withdraw from the joint rate. Similar jurisdiction is held by the I.C.C. covering carriers operating in United States territory.

It follows, therefore, that joint international rates must be a matter of negotiation between the Railways involved and such joint rates cannot be prescribed by either the Board or the I.C.C. If through joint rates were not in effect, the applicable rate would be a combination rate of the factors on and off the international border. Such a combination would be a higher than a joint through rate that might be negotiated between the Railways in Canada and in the United States.

There are many through international joint rates between Canada and the United States, both in Eastern and Western Canada. There is a full scale of joint through class rates between points in Official Classification Territory in the United States (that is, east of the Mississippi and north of the Ohio and Potomac Rivers), and points in Eastern Canada. These rates make lower than the combinations on the border. In Western Canada, on the other hand, there is not a full line of joint through class rates between Western Trunk Line Territory (West of Mississippi and West Bank of Lake Michigan to Inter-Mountain) and points in Western Canada. The reason for this is the higher basis of class rates in Western Trunk Line Territory in the United States. Therefore, any joint through class rate related to the United States rates would be higher than the applicable rate to the border and the standard mileage class rate from the border to Western Canadian

destinations. Mr. Jefferson, at pp. 16584-5 of Vol. 84, made this clear:

"Q. Now is there a difference in the rate levels in the Western United States as compared with the Eastern United States?

A. It is higher in Western United States than in Eastern United States.

Q. What significance has that on the question as to whether there are or are not through class rates between Western Canada and Western United States?

A. Well, the significance that I would attach to it is that the rates in Western United States are so high that if you take their rates to the boundary and add even our standard mileage rates north of the boundary, you get a lower rate for the international movement than the movement wholly within the United States for an equivalent distance."

There were a number of representations made to your Commission in Western Canada and the point was often referred to in your proceedings by Mr. Frawley that Canadian Railways in charging the standard mileage class rates from border gateways in Western Canada were in some way placing an undue burden on traffic moving into Western Canada. I submit that this is clearly not so.

The claim that lower rates should apply from border gateways rather than standard mileage class rates cannot be supported, because such rates would only enable American producers to compete with Canadian ~~pre-~~

producers to the detriment of the Canadian producers and also to the detriment of railway revenues. American carriers would not give the same consideration to traffic moving southbound from Western Canada to Western United States points.

I do not wish to spend time going through, once again, the many discussions which we have had during the proceedings regarding the necessity for increasing joint through international rates to the same extent at the same time as rates in the United States are increased.

I think Mr. Jefferson's evidence has made it abundantly clear that there is an absolute necessity of maintaining the continuity of joint international rates via all gateways and that if increases in joint through international rates were not authorized by the Canadian Board at the same time as increases were authorized in the United States, the American carriers would increase the rates and take the full amount of the increase and not share such increase with their Canadian connections.

The alternative would be that they could cancel the through rates and let the traffic move on border combinations. If the American carriers took the full amount of the increase and did not share it with their Canadian connections, Canadian shippers and consignees would not benefit and there would be a loss of revenue to the Canadian Railways which would have to be made up by increasing other charges. If the American carriers, on the other hand, took the alternative and cancelled the through rates, the resulting border combinations would make higher rates than would be obtained by applying the American increases.

The experience during price control, when increases on joint through international rates were authorized, was an acknowledgment by the Wartime Prices and Trade Board of the necessity of handling international rates in the manner in which they have always been handled by the Railways. I submit this is most cogent evidence that the Canadian Railways' method of handling joint through international rates is in the interest of Canadian shippers and consignees.

It is in the interests of both United States and Canadian Railways to promote the free movement of traffic both within their respective countries and between Canada and the United States.

As pointed out by Mr. Jefferson in Volume 74, at page 15048, in publishing through joint international rates the general policy of the United States railroads is that they will not agree to through rates from origins in Canada to destinations in the United States on a lower basis than is applicable on the same commodity within the United States and, likewise, the Canadian railroads adopt a similar policy with respect to rates from origins in the United States to destinations in Canada. This obviously is sound so as to protect industry in either country.

The necessity for applying the American increases to the joint international rates is made clear by Mr. Jefferson's examples of newsprint paper moving from Three Rivers, Que. to Chicago as compared to newsprint from Millinocket, Maine to Chicago, and also his example of lumber from Seattle to Boston compared to lumber from Vancouver to Boston. (Vol. 74, pp. 15060-1; pp. 15086-9).

Another point on the matter of international rates which I would like to discuss is the suggestion

that the Canadian shipper or consignee would benefit if there was a convention or something of that nature between Canada and the United States which would vest in some body jurisdiction over international rates. It is the submission of Canadian Pacific that if such a body were established, the result would be the same as exists today. During Mr. Covert's examination of Mr. Jefferson, this point was, I submit, clearly dealt with and I would like to refer to Vol. 84, p. 16509, where the following occurred:

"Q. Now, Mr. Jefferson, do you think that there would be any advantage in joint sittings of members of both the Interstate Commerce Commission and the Board of Transport Commissioners on questions of joint through international rates?

A. I would not think so, no.

Q. There would be no advantage at all?

A. No, sir.

Q. Could you tell me why you think there would not be?

A. Because, I would say in answer to that question, you would be no farther ahead, because the way things are done is what should be done, and would no doubt be done if you had joint sittings of the two Commissions, because it is in the interests of good business to do it the way we are doing it today.

Q. And, therefore, you say, that any recommendation that there should be joint sittings between members of the

two Boards, is really not worth considering, because the effect would be bound to be the same?

A. Yes, you would accomplish nothing."

Manitoba has accepted the position of Canadian Pacific on the subject of international and related rates. Mr. Shephard, Vol. 118, p. 21415 said:-

"Manitoba accepts the evidence of Mr. Jefferson to the effect that the present system of increasing the Canadian portion of international and related rates in accordance with increases granted by the I.C.C. in the United States is necessary and no change is recommended in regard to the method of handling these rates."

The jurisdiction of the Board on overhead movements will be found in Sections 338 and 339 of the Act.

Alberta, Vol. 108, p. 20015, has proposed a new subsection to Section 338, to be 338 (2), which is obviously designed to meet the restrictions provided in tariffs on international movements which prohibits the use of the international rate on traffic moving from a point in Canada, through the United States, to another point in Canada. These restrictions are placed in the tariffs at the instance of Canadian railways to protect their through Canadian rates. In the United States there is a rule that no rate will be recognized unless the tariff is on file with the I.C.C. and the United States lines are protected by having combinations through Canada which might work to defeat the through United States rate blocked because Canadian railways do not file their local tariffs with the I.C.C. The

reason for this cooperation between the Railways of Canada and the United States to protect their through rates against the aggregate of local rates which would make lower than the through rate, is because local rates are often brought about through conditions which, of course, would only be effective in the local territory and should not inure to the benefit of traffic which is not subject to such local conditions, such as through traffic on which the Railways are trying to protect their published through rate.

The result of Alberta's proposed Section 338 (2) would in effect compel the Railways to apply to traffic moving wholly within Canada the benefit of a rate in the United States, not on file with the Canadian Board, regardless of the fact that the conditions which necessitated the local United States competitive rate do not extend to Canada.

I submit that Alberta's proposal is clearly an attempt to secure a lower rate where there is no justification whatsoever for such lower United States rate being used to break down purely Canadian rates on purely Canadian movements.

I submit that the proposition of Alberta as set forth in the proposed Section 338 (2) is unsound from every recognized principle of rate-making and can only be characterized by examples that have been demonstrated time and again throughout your hearings of Mr. Frawley grasping at straws and looking for advantages which cannot be secured without dislocating sound established rate-making principles.

In considering Alberta's proposed Section 338 (2) I also wish to stress that its effect would be to force the Canadian rate to be governed by a rate in the

United States over which the Canadian railways have no control, nor any voice whatever in the establishment of it, and which rate would not even be on file with the Board of Transport Commissioners. It would be manifestly unreasonable to expect the Board to be forced to recognize by statute, as lawful, rates on purely Canadian traffic under its sole jurisdiction, which they know nothing about and are not even able to check or verify and on which they would have no voice as to their reasonableness or unreasonableness.

EXPORT AND IMPORT RATES.

Mr. Jefferson's evidence is at Vol. 74, pp. 15053-58; Vol. 83, pp. 16425-29.

It is a recognized principle of rate making that there may be a difference between export and import rates and domestic rates. The circumstances and conditions surrounding the two movements are entirely dissimilar.

Before discussing Export and Import rates, I would like to emphasize that Alberta's proposals for mandatory equalization would preclude export and import rates from ever being on a lower basis than domestic rates. This point was called to Mr. Frawley's attention by Dr. Angus. Mr. Frawley disclaimed any such intention but admitted that his draft legislation might have this effect. The point I wish to make here is that it indicates the far-reaching effects of removing from Section 314 the words "under substantially similar circumstances and conditions" and, if I may say so, the failure of Mr. Frawley to think the matter through.

In dealing with Export and Import rates there

are two factors that must be given weight:

1. The haul within Canada is only a part of the through transportation movement and charge.
2. Port competition is most important. This circumstance has no relation to domestic movements.

The general principles applying to discrimination cases are applicable in dealing with export and import rates. However, the Board has specifically dealt with export and import rates in numerous decisions. I have not the time, nor do I think it is necessary, to discuss many of the Board's Judgments on this subject. A number of the more important statements of the Board will be found in *Fraser Valley-Surrey Farmers Co-operative Association v. Canadian Pacific Railway*, 43 C.R.C. 97. This Case was referred to during the Commission's hearings in Alberta and British Columbia. In the *Surrey Farmers Case* the Board, at p. 122 quoted from one of its previous decisions as follows:-

"Commenting very briefly on the broad question of import or export rates lower than the domestic rates, it may be stated that the rate structure has always recognized such a condition, and the Board has also approved of it as being, under certain circumstances, a proper one, not contrary to the provisions of the Railway Act. In many decisions of the Board, the carriers have been required to establish import and export rates lower than governing when the same traffic is

moving locally between the same points in Canada, and the Board has stated, in many decisions, that an import rate is in no sense a necessary measure of the reasonableness of the domestic rate, or proving that unjust discrimination exists. Such rates are but proportions of through tolls governing on the traffic from point of origin to final destination. Further, import, as well as export, traffic is subject to port competition."

If we are to have a reasonable rate structure in Canada, which is in the public interest, and which allows traffic to move freely, it is beyond me to understand how we can have export and import rates maintained always on the same basis as domestic rates.

Export and Import rates apply to traffic moving to and from countries outside of North America. Since there are many ports competing for this traffic, established relationships both on the East and on the West Coast must be maintained if an orderly flow of traffic is to continue. Views have been expressed by the Maritime Transportation Commission which, if given effect to, would disrupt a relationship which has been built up between the Atlantic ports extending all the way from Montreal to New Orleans, and which relationship has existed for over 70 years. The views of the Maritime Transportation Commission will be found

in Volume 1 of their Submission, at pages 94 to 97.

The crux of their complaint is this, that they want to maintain at all times during the season of open navigation on the St. Lawrence River, under all circumstances, a fixed relationship between Montreal and Saint John. This without regard to whether export or import rates are used or whether the domestic rate, plus terminal charges, might make a lower charge to Montreal than the regular export basis, and regardless of whether it would disrupt the long existing relationship between Saint John - Halifax and the United States Atlantic ports of New York, Boston and Portland.

Any disruption of the port relationships on export and import traffic could have far reaching effects.

Under the long established principle of port relationships it has always been recognized that where the local domestic rate to any individual port city, plus the terminal charges to make the necessary delivery on the dock, makes lower than the published export basis, that such local rate, plus the terminal charges, cannot be exceeded. This is not only true of Montreal, but is equally true of all other ports, including the Maritime ports.

Mr. Jefferson, at page 15054, Volume 74, quoted from Orders of the Board, which authorized the rates to and from the Canadian ports being increased to the same extent as rates were increased to and from related United States ports.

The Board, in granting the United States increases in the rates to the Canadian ports, stated that it was deemed by the Board to be expedient in the public interest that the maintenance of the parity of port relationships should be preserved.

The Maritime Transportation Commission has suggested an amendment which would require that the Board, in fixing just and reasonable rates, shall give due consideration, among other things:-

(Sec. 325(5)(d))

"... to the effect of changes in export and import rates in disrupting the relationships between Canadian ocean ports and the Board shall, upon the application of any party interested, or may of its own motion, inquire into the incidence of all or any export or import rates fixed or determined since the 27th day of March, 1938, and shall change and alter such rates in such manner and to such extent as it may consider necessary or expedient in order to restore the relationships which it may find to have been disturbed."

I submit that the only result of the amendment would be to cause disputes that the present practice of the Board has not been in the public interest, and that it has prejudiced Canadian ocean ports. It must be remembered that not only the ports of Saint John and Halifax must receive equitable treatment from the Board, but also the ports of Quebec, Three Rivers and Montreal. I say there is no necessity whatever for the proposed amendment because:-

1. The Board has shown by its Orders granting increases that it did so after due consideration of what was expedient in the public interest. In coming to its decision the Board, of course, included

consideration of any disturbance that did take place in an existing relationship between Canadian ports.

2. The Board would, of necessity, have to follow the present practice. If the present practice was not followed the relationship between Canadian ocean ports and United States ocean ports would be disrupted. This result, undoubtedly, would be detrimental not only to Canadian ports themselves, but Canadian interests generally.

AGREED CHARGES

The written submissions of Canadian Pacific are to be found in Part I, pp. 87090. Mr. Jefferson's evidence is at Vol. 68, pp. 14010-54; Vol. 74, pp. 15014-6; Vol. 77, pp. 15569-79; Vol. 78, pp. 15643-56; Vol. 79, pp. 15812-18; Vol. 82, pp. 16289-304; Vol. 84, pp. 16475-93.

Agreed charges are an important source of revenue to Canadian Railways. In 1949 the revenues of Canadian Pacific from traffic moving under agreed charges was estimated to be in excess of three and one-quarter million dollars. This is shown in Exhibit (49)-181 in the 20% Case. If Part V of the Transport Act were repealed, a very substantial part of this revenue would be lost to the Railways.

Prior to the enactment of Part V of the Transport Act, Statutes of Canada 1938, Chapter 53, the Railways could not enter into a binding agreement which would enable them, under specified terms and conditions, to move goods at a lower rate for one consignee or

group of consignees than the rate applicable to the public generally.

The Railways applied to Parliament for the right to make Agreed Charge tariffs so as to be better able to meet unregulated competition. This unregulated competition is to be found in bulk movements by water on the Great Lakes and Upper St. Lawrence but is more particularly prevalent in the motor truck field.

You will recall that Mr. Jefferson, Vol. 82, p. 16289, stated that "if all modes of transportation were properly regulated and regulations fully enforced there would not be the same necessity for Agreed Charges as there is today."

Mr. Hazen Hansard, who appeared for Canada Steamship Lines, which company is only partially regulated, at Vol. 70, p. 14308, recognized there was some justification for Agreed Charges, "so long as adequate control of all competing transport agencies has not been brought into effect."

Part V of the Transport Act enables the Railways to compete with unregulated competition to an extent that is not otherwise available to them.

The present provisions of the Act are generally satisfactory to the Canadian Pacific although we have no objection to the greater flexibility which would arise if the Canadian National proposals, as now submitted, were put into effect. This was made clear by Mr. Jefferson during his cross-examination by Mr. Covert, which will be found at Vol. 82, pp. 16289-304.

In the proposed legislative amendments submitted by the Provinces, only Manitoba has dealt with the question of Agreed Charges. Manitoba proposes to repeal in toto Part V of the Transport Act. However,

I note during Mr. Jefferson's direct examination, Mr. Frawley interjected and you, my Lord, asked him if he could draft some amendments to meet the needs of the small shipper, about whom he is allegedly concerned. This will be found in Vol. 68, p. 14029. Mr. Frawley's answer was:-

"I thought I would try with a very short one, calling for its repeal.

THE CHAIRMAN: But anybody can do that.

MR. FRAWLEY: I shall see what can be done to make it fair. For example, the Lion Oil Company cannot meet the conditions. Mr. Jefferson makes it sound very simple, but the small business man can only get it if he meets the condition.

THE CHAIRMAN: We need not pursue the argument any further at this time, and if you would be so kind as to draft your proposal, then at the proper time we will argue its merits."

In spite of your request, we have had no proposed amendment from Alberta. Mr. Jefferson, you will recall, took the position that the Agreed Charge legislation was not unfair to the small shipper. The Act makes it clear that on application any shipper not a party to the Agreed Charge can get the benefit of the rate by applying for a fixed charge.

Mr. Frawley and Mr. Shephard seem to have been under the impression that a small shipper who did not have facilities at a railway unloading station or who did business in areas not served by railways would be unable to secure Agreed Charges on as favourable a basis as

another. This is not the fact as was made clear by Mr. Jefferson, Vol. 79, pp. 15814-7.

I would also like to recall to your Commission that there has been no complaint from any shipper party to an Agreed Charge and that you, my Lord, referred to this fact at Vol. 79, p. 15818. I also think it is not without significance that no Provincial Counsel has been able to produce a witness who could positively give an instance where anyone was suffering an injustice under the present Agreed Charge legislation. The witnesses for the Provinces contented themselves with hypotheses and theory.

I hasten to recall the evidence of Mr. Christian of Anglo-Canadian Oil, which evidence will be found in Vol. 4 at pp. 485 and 503. His complaint really amounted only to this; that he was not prepared to deprive himself of the use of trucks where that method of transportation suited his convenience, and thereby enable himself to obtain the same rate as his competitor on the same conditions. I submit that Mr. Christian suffered no injustice under the existing Agreed Charge legislation.

Mr. Moffatt, Vol. 50, p. 9573, took the position that Agreed Charges should be compensatory, should bear their share of increases, and should be made more generally available to all firms. Agreed Charges are, undoubtedly, compensatory, as can be seen by reference to the table at page 80 of Part I of our Appendix. The compensatory nature of Agreed Charges is also a matter that the Board must give consideration to under Section 35 (13) of the Transport Act. As to the Agreed Charges bearing their share of increases; where the Agreed Charges can be renegotiated at a higher basis,

this has been done, according to the evidence of Mr. Jefferson. The majority of Agreed Charges, it must be remembered, apply on high rated traffic. (Vol. 82, p. 16034).

Mr. Moffat's suggestion that Agreed Charges should be made more generally available to all firms was clearly shown under cross-examination to mean that he wished to have the Agreed Charge reduced to the same status as an ordinary competitive rate. Mr. Shepard made this clear in his argument (Vol. 119, p. 21553). This, of course, overlooks the fact that under Section 35, s.s. (1) of the Transport Act, the Board shall not approve an Agreed Charge "if, in its opinion, the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff."

Mr. Harries, appearing for Alberta, in Vol. 56, p. 10914, took the remarkable stand that he was in the truckers making contract rates but was not in favour of the Railways doing so. He tried to support this on the basis that the Railways, by making Agreed Charges, enter into the economic sphere of the truck, but at p. 10936 he admitted he did not know that in some of the Agreed Charges provision was made enabling the shipper to ship by truck within a certain mileage, even though one of the Agreed Charges in which this is permitted is one covering Petroleum Products out of Calgary and Valessio. (Agreed Charge No. 36).

I think it should be emphasized that, if the Railways are not in a position to make a firm agreement, such as provided in the Agreed Charge provisions of the Transport Act, shippers can use the fact of competition to bargain with the Railways or with the truckers for lower rates than the competition and the cost of providing the service warrant. This fact was recognized by

Mr. Harries at p. 10926 of Vol. 57, when he said that he understood that there had been instances of this practice.

The Automotive Transportation Association of Canada has attacked Part V of the Transport Act, and has recommended its repeal. I say it ill behoves the truckers to come before your Commission and ask to have the Railways denied a method of meeting unregulated competition when, at the same time, they object to regulation of interprovincial and international trucking by the Dominion, which is the only body which has jurisdiction over these types of movement; and they objected to coming within the Transport Act in 1938 when, if they had done so, they would have had the same benefits as the Railways when serving competitive points. (Goodman, Vol. 55, p. 10493). It should also be remembered that Mr. Jefferson, at Vol. 68, pp. 14050-51, stated "the contract truckers originated the idea of an agreement with shippers" and Mr. Jefferson also expressed the opinion that the so-called "contract truckers" were more numerous than the so-called "common carriers" by truck.

Mr. Shepard (Vol. 119, p. 21553) suggests that it is the view of his Province that the Agreed Charge has enabled the Railways to eliminate truck competition rather than to meet it. Certainly, if Railways are able to keep certain traffic from moving by truck they are only able to do so because they are able to handle the traffic at a charge to the shipper which the truckers are not prepared to meet and give the service the Railways are prepared to offer. In view of the fact that the rail rate is compensatory, surely this proves that, for that traffic, the railway

is the most economic medium.

The views of Canadian Pacific can be summed up in this way -- Parliament, after very full consideration, recognized the necessity of giving to the Railways a method to meet unregulated competition. Unregulated competition has increased rather than decreased since the Agreed Charge provisions of the Transport Act were enacted in 1938. The two major railways in Canada have from eight to nine million dollars annually of revenue involved in Agreed Charges. This traffic is profitable traffic, as the provisions of the Act make it necessary for the Railways to prove that their net revenue position will be improved by the Agreed Charge.

When we have the Prairie Provinces violently objecting to necessary increases in freight rates, it is more than a little difficult to understand why they propose eliminating a method which will allow railway net revenues to be increased in a manner that is fair to the Railways and to the shipping public.

I submit that Part V of the Transport Act is necessary to the Railways and certainly should not be repealed. If anything, it should be amended to remove some of the more rigid controls in the existing legislation.

NATIONAL TRANSPORTATION POLICY

Written submissions of Canadian Pacific will be found at pp. 197-202 of Part I. Evidence was given by: Mr. Crump at Vol. 66, pp. 13821-24; Mr. Newman, Vol. 93, pp. 17658-9; pp. 17696-715. Considerable evidence on Highway Transport was given by Mr. Gaffney, Vol. 48 et seq.

The level of prosperity in any modern state is particularly dependent upon the transport industry. Canada has a tremendous transportation plant. The growth of the transportation industries in Canada has been phenomenal. The provision of the excellent transportation facilities now enjoyed by Canadians was a result partly of government assistance and partly the investment of private funds. The initiative of developing transportation facilities in Canada has been largely left to private enterprise. This is true of rail, water and highway and, to a lesser extent, of air transportation. Canadian Pacific is definitely not of the view that the best interests of Canada will be served by having the transportation industry controlled and managed by government.

The government's substantial entry into the rail transportation field arose on account of over-expansion of rail facilities and the inability of private companies to meet their government-guaranteed financial obligations.

After considerable pioneering work had been done in the field of air transportation the government, desiring a rapid expansion of the air transportation network in Canada, largely supplanted private enterprise in this field. Today the largest operator is the government-owned Trans-Canada Air Lines, although Canadian Pacific Air Lines is providing service over some thousands of route miles and smaller operators are active in meeting transportation requirements in many communities.

Inland water and coastal transport services are very largely under private enterprise.

The national transportation policy of Canada must be one which will permit efficient low-cost

factor in Canadian transportation is the carriage of goods and persons by rail. Water, air and highway transport are essential to the Canadian economy, but it is submitted the present promotion of these media of transport through government assistance and lack of effective regulatory supervision is contrary to a sound national transportation policy.

Canada has had one experience of the results of excessive promotion of transportation facilities. The settlement boom of the early 1900's and the desire of Canadian governments to extend transportation facilities far in advance of the needs of commerce resulted in the bankruptcy of two of the three trans-continental Canadian rail lines and the entry of the government into the transportation industry as the owner and operator of a large transportation plant. That the excessive promotional activities of governments in the transportation field prior to the First world War were incompatible with the aim of economical and efficient transportation is a historical fact which has been recorded in many places, including Volume 1 of the Rowell-Sirois Report, p. 69.

It is not without significance, I submit, that the abolition of tolls on Canadian canals in 1903 coincided with the excessive promotional activities of the government in other transportation fields. The tremendous expenditures by governments on facilities used by highway and air transportation, the continuing government expenditures on canals, docks and wharves, and the possibility of much greater government expenditures on inland water transportation, all suggest the definite possibility of Canada once again, through

excessive promotional activities, preventing a proper national transportation policy being effected.

The desirability of having a transportation policy on a sound economic basis has been frequently stated. I submit to date, however, the obstacles in the way of achieving this aim have apparently proved greater than the conviction that remedial steps need to be taken. The problem is to have a co-ordination of the various media of transport so that each may best operate in its proper economic sphere. It is not the view of Canadian Pacific that the economic sphere of the various media of transport can be defined with any precision, nor is it our view that restrictions should be placed on any media of transport so as to artificially assign segments of the transportation requirements to the various media.

How best to attain the essential national Canadian transportation policy does not lend itself to easy solution. We have constitutional difficulties through the Provinces' jurisdiction over highways. The Dominion, however, has undoubtedly jurisdiction over railways, inland waterways and coastal shipping, as well as aeronautics. In the highway field, I submit the Dominion clearly has jurisdiction over the inter-provincial movements of passengers and goods by highway transport, as well as international movements by this medium. There is no uniformity of regulatory supervision over the various media of transport within Dominion jurisdiction. The control exercised extends from the elaborate control over railway transportation to no control at all over highway transportation.

If the Dominion is to continue to exercise control over rail transportation, and I have heard no

one suggest that some control is not advisable in the public interest, then surely the Dominion should exercise some control over highway transportation. If, on account of the constitutional difficulties, control over the total highway transport field cannot be brought about, that should not, I submit, deter the Dominion in exercising its jurisdiction to control that portion of highway transportation which is clearly within its jurisdiction.

I submit that your Commission should recommend to Parliament the enactment of legislation to vest in an administrative tribunal power to control and regulate highway movements of passengers and goods interprovincially and internationally, and should also recommend that the Dominion take the initiative in bringing about uniform regulation of highway transportation within the provincial ambit of jurisdiction, first through co-operation and agreement, and failing that, by amendments which would transfer jurisdiction over highway transportation throughout Canada to the Dominion.

Some Regional differences in the railway rate structure have resulted from the necessity of the railways meeting competition. That is not to say that such anomalies are, under the existing circumstances, unwarranted. However, I submit that these differences would be lessened if all transport media were required to cover, by the charges made for services, the total economic costs of providing such services. Undoubtedly, as has been recognized by Deering & Owen in their book on National Transportation Policy, published by the Brookings Institution in 1949, at p. 87: "When one form of transportation is subsidized by public

expenditures for basic facilities, traffic may be attracted to the subsidized agency because rates do not have to cover total economic costs".

Canadian Pacific has not the personnel, the facilities nor access to necessary records to enable a thorough study to be made of government subsidies both direct but more particularly indirect to highway, water and air transportation. From material available and the study Canadian Pacific has been able to give to the problem, it would appear clear that transport media competing with the railways are receiving substantial subsidies. I understand, however, that the research staff of your Commission has been giving consideration to this problem and it is not my intention to discuss transportation subsidies in detail. Certainly all railways in Canada have received government assistance. On account of the tremendous risks in the initial stages of the development of each media of transport, I think it can be admitted that some government aid was necessary to augment private investment if the transportation facilities were to be inaugurated and encouraged. It is the submission of Canadian Pacific, however, that water, highway and, to a lesser degree, air transportation have now become firmly established in Canada and government assistance is not necessary to secure development of these media on a proper economic basis.

There are continuing subsidies being received by all media of transport except railways and it is no answer to the railways' problem of meeting subsidized competing forms of transport to point to the fact that in the initial stages railways were recipients of government aid.

Dr. Locklin, in his book on the Economics of Transportation, Third Edition, at p. 839, covers the point in this way:-

"That they were subsidized admits of no doubt. Such subsidy, however, is of little significance at the present time. Land donated to railroads for rights of way has entered into present valuations and rate base in the same manner as if it had been purchased. Funds originally donated to railroads for construction purposes have been converted into physical property which enters into the rate base. Very little, if any, of the subsidy granted to railroads has relieved shippers of paying any part of the current expenses of operating and maintaining the railroad system or has relieved them of the burden of paying, if possible, a return on the capital invested in railroads. Part of the cost of water, highway and air transport, however, is borne by the taxpayer and not by those whose goods are transported by these agencies."

Where there is a continuing subsidy to competing media of transport which is paid by the taxpayer, there is an undoubted hardship on the railways and those using its services. In dealing with water transport, Deering & Owen, National Transportation Policy, at page 88, say:-

"It is true that charging tolls would result in dislocation yet the absence of tolls means hardships on those carriers, shippers and sections of the country which do not have the advantage of cheap transportation on toll-free facilities but which must nevertheless help defray their costs."

Subsidies to competing modes of transport also prevent the proper economic distribution of transportation facilities and distribution of traffic among the various media according to proper economic spheres. Dr. Locklin, at page 843, says:

"If water transport or highway transport appears to be cheaper, because the taxpayer pays part of the costs, there will be a tendency to over-expand these transportation facilities, even though they may not provide a cheaper or superior mode of transport when all costs are considered."

Canadian Pacific has investments in all media of transport in Canada, with the exception of pipe line transport. It is convinced that each media of transport has a definite service to perform and, in its own sphere, each medium of transport can efficiently provide economic low-cost transportation in accordance with what we submit must be the national transportation policy. To perform its proper function, Canadian Pacific does not believe that water transportation, air transportation or highway transportation require subsidies except in rare

instances where service is being performed in advance of traffic requirements or where service is performed for sociological or defence considerations.

I do not wish to overlook a new development in Canada in relation to the activities of the federal government. Last year we had the first example of federal government granting substantial aid for highway construction. Very substantial sums are being allocated by the dominion government in aid of the Trans-Canada Highway. This facility will be used by highway transport and we submit that your Commission should recommend to Parliament that any highway construction grants out of the federal treasury should only be made on the condition that highway transport using any facilities to which federal aid is extended should be compelled to bear a

fair proportion of the cost of constructing and maintaining such facilities. I submit that the federal government aid to highway construction will no doubt increase. The experience of the United States I think is indicative. The beginning of federal action in the United States on a nationwide basis occurred in 1916, with the enactment of the Federal Aid Road Act which provided for an appropriation of 75 million dollars over a period of 5 years. This can be contrasted with the present position where the United States federal government is committed to a 450 million dollar aid programme for each of the fiscal years ending June 30, 1950 and 1951. (National Transportation, Deering & Owen, pp. 106-7).

If Canada is to expand its highway programme for use in part by highway transport it should at the earliest possible date have a realistic approach to determining and collecting user costs for use of highway

facilities. I submit that it is clear that the time to establish a policy of user costs in connection with highways is now, before government expenditures on a basis not surrounded by such a realistic approach become established.

I would like to emphasize that railroads compete with highways and the distinction I have in mind is that the competition arises not only from the so-called for-hire common highway carriers or from contract carriers, but also from firms and individuals who transport their own goods. In determining and collecting user costs from highway users, a realistic approach could be made in allocating the burden between private passenger vehicles, commercial passenger vehicles, farm trucks, commercially owned and operated trucks, contract carriers and general for-hire carriers.

Air transportation is today providing stiff competition for the railways on long haul passenger travel. Mr. Newman expressed the view that the big field for air transportation expansion was in the cargo field. Air transportation provides economic benefits on account of the speed with which it can move persons and goods. The economic advantages gained by this speed should, I submit, be reflected in the costs charged for the service rendered and it is most important, in my submission, that the users of the service pay the cost of providing air service to prevent economic waste of labour and materials and to prevent dislocation and economic loss through unfairly hampering other media of transport in their proper field.

Canadian Pacific recommends, therefore, that your Commission recommend that air operators be charged a fair proportion of the cost of providing airports,

aids to navigation and meteorological services.

That all media of transport bear the cost of facilities used by them is basic to a proper control of transportation in Canada. It is also of the utmost importance that effective regulation be exercised over all media of transport if co-ordination is to be brought about. This has been recognized by students of transportation and, what is likely more important, by the government. In 1938, when the Transport Act was enacted, the Board of Transport Commissioners was given jurisdiction not only over railways but also certain inland water movements and also air transportation. Subsequently air transportation was placed under an independent regulatory tribunal by the Aeronautics Act, and control over coastal water transportation was extended through granting certain regulatory controls to the Maritime Transportation Commission.

The section of the Transport Act with which I wish to deal at this time is Section 3(2) which provides:-

"3(2) It shall be the duty of the Board to perform the functions vested in the Board by this Act and by the Railway Act with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways and ships ~~and aircraft~~ and the Board shall give to this Act and to the Railway Act such fair interpretation as will best attain the object aforesaid."

Amended
S.C.Chap 25
1944-45

By depriving the Board of Transport Commissioners of control over air transportation and by not extending to them jurisdiction over highway transportation and only over a part of inland water transportation, I

submit the Board of Transport Commissioners cannot effectively co-ordinate transportation in Canada. Canadian Pacific's views in regard to regulatory supervision of the various media of transport are expressed in its written submission at pp. 201-2 of Part I and I would like to read that now:-

"Although the main factor governing the provision of service should be the natural economic controls imposed by cost of service and value of service, to the extent that such economic controls need to be supplemented by administrative controls, the administrative controls should be coordinated for all forms of transportation.

"Canadian Pacific submits that your Commission should recommend that the administrative tribunals controlling inland water and air transportation should be required before licensing any transportation service to determine whether the service to be provided will be redundant and to consider the effect of such redundancy on the existing forms of transportation.

"In the opinion of Canadian Pacific it is difficult to establish either uniformity of regulation and procedure or the true coordination of the various competing forms of transport except by means of a regulatory body with unified control over all forms of transportation and Canadian Pacific accordingly submits that some means should be provided by which this can be brought about. This would not necessarily mean an immediate elimination of such bodies as the Air Transport Board but it is rather intended to suggest that one board with different branches

would be superior to several boards functioning independently."

Mr. Hume, on behalf of the Canadian Automotive Transportation Association for Canada, and Mr. Shepard, on behalf of the Province of Manitoba, are apparently of the view that it is the position of railways that trucks should be artificially restricted. On behalf of the Canadian Pacific I wish to emphasize that this is not so. Our position is that control is necessary to see that highway transport in particular should live up to its obligations, that is to say, provide regular service at fair and reasonable rates not lower than the full economic cost of the service without unjust discrimination or undue preference. If this is restrictive, I say it is restrictive in the public interest.

Mr. Hume (Volume 118) in stating that inter-provincial and international highway transportation should not be regulated by the Dominion, made a point of the fact that there was a relatively small number of over-the-road vehicles now engaged in this service. My answer to that would be that the time to have realistic control would be at the outset and it is only the Dominion which can provide such realistic control. I do not think that any one considering Section 92(10)(a) of the British North America Act could seriously question the Dominion's power to control the movement of persons or goods interprovincially or internationally.

The last point with which I wish to deal is Mr. Hume's suggestion which is summed up at page 21355 of Volume 118, that any coordination between rail and highway should be done by cooperation between the railways and existing truck operators. There are many reasons why the Canadian Pacific should not in any way be restricted from providing a highway transport service

where it is good business to do so. Mr. Newman made it clear (Vol. 93, pp. 17716-7) that it was not the intention of Canadian Pacific to supplant the truck but that we would only use independent truckers where they could provide the service we needed at an equal or lower cost than we could provide it ourselves. Mr. Newman in his evidence, (Vol. 93, pp. 17697-707) set out some of the reasons why we could not contract with independent truck operators in providing an integrated rail - highway service, and I will not take time to review them now. I think the difficulties of securing a proper contract between two competing agencies is so serious that Mr. Hume's proposal is impractical and would unduly restrict the ability of railways to reduce costs through a proper blending of the economic advantages of rail and highway transport.

(Page 23765 follows)

MR. COVERT: Just before Mr. O'Donnell opens, my lord, I just received a further telegram from about sixteen manufacturers in New Brunswick in which they state:

"As manufacturers of New Brunswick the undersigned industries are strongly opposed to the extension of the Maritime Freight Rate Act to apply on shipments eastbound to the Maritime Provinces as proposed by the Province of New Brunswick as it would be contrary to the findings of the Duncan Commission as recognized by the Maritime Freight Rate Act stop We are compelled to submit this telegram because evidence presented to your Commission would suggest that there is no opposition to the eastbound proposal stop Would you please read this telegram into the records."

It has been signed by, as I say, about sixteen manufacturers including T. S. Simms & Company Limited, Enterprise Foundry Company Limited, Enamel and Heating Products, Limited, Marvens Limited, Northern Machine Works Limited, Beatty Snowflake Lime Limited, Moosehead Breweries Limited, Barbour Company Limited, Wilson Boxes Limited, Wallace Manufacturing Company Limited, Sussex Ginger Ale Limited, Brown Holder Biscuits Limited, Record Stove and Furnace Company Limited, Ganong Bros. Limited, the J. S. Brown Manufacturing Company, T. McAvity and Sons, and Ferguson Atlantic Underwear Limited. I will hand it to the reporter.

MR. SINCLAIR: There is one point that your lordship asked me this morning and that was in connection with the study as to passenger expenses and revenue. The exhibit that we filed was Exhibit 180, and that arose in this way. In Part I of our Submission in the last

complete paragraph on page 124, we referred to studies of this nature which were filed in the 21% Freight Rate Case.

In volume 81, page 16188, the Chairman (you, sir) asked if we would provide a study showing passenger losses and in Volume 85, pages 16597 to 8, Mr. Liddy filed and explained Exhibit 180. Now, this exhibit shows an apportionment of railway operating revenue and expenses between passenger and freight services for the year 1948 and it is an allocation and an allocation only based on all-inclusive costs.

Volume 90 at page 17300 Mr. Covert asked Mr. Liddy if on the whole -- and I use his words -- "on the whole class 1 roads in the United States regarded their passenger situation as a serious one that, generally speaking, they regarded ^{it} as a losing business", and Mr. Liddy answered by: "I do not think they regard it so much as a losing business in so far as they would make more money if they had no passenger business. They regard it very much like we do that the passenger business is not able to bear its prorata share with freight on all the items of expense."

THE CHAIRMAN: You just referred to a page in Volume I of your Submission. What page was that?

MR. SINCLAIR: That was page 124. That is where we made some references to these statistical allocations of all costs.

THE CHAIRMAN: Well now, give me the number of the exhibit.

MR. SINCLAIR: 180,, my lord.

THE CHAIRMAN: Just one exhibit?

MR. SINCLAIR: Yes, 180.

THE CHAIRMAN: What was the final figure?

MR. SINCLAIR: Those figures that are shown on this exhibit required some explanation and --

THE CHAIRMAN: We have the explanation but give me the final figure there.

MR. SINCLAIR: It shows here that the expenses solely related were \$39 million odd. The expenses apportioned were \$52 million odd, to make a total of \$91 million odd and the revenues were \$62 million odd.

THE CHAIRMAN: We are to hear from you then, Mr. O'Donnell?

MR. O'DONNELL: Yes, my lord.

ARGUMENT SUBMITTED ON BEHALF OF THE CANADIAN
NATIONAL RAILWAYS BY

MR. H. E. O'DONNELL, K. C.

May it please the Commission. On opening the argument on behalf of the Canadian National Railways it occurred to me desirable to read the Order in Council under which this Commission was constituted, that part pertaining to the Canadian National Railways.

By Order in Council P.C. 6033 of December 29, 1948, the Commission was directed to --

"Review the capital structure of the Canadian National Railway Company and report on the advisability or otherwise of establishing and maintaining the fixed charges of that company on a basis comparable to other major railways in North America."

The Canadian National welcomes this first real opportunity to put before any tribunal having jurisdiction to inquire into the subject, the merits of its request for consideration and adjustment of what, in its view, are unjustifiable financial burdens which, through the years, have beclouded its operating results and precluded the great majority of Canadian people from understanding the efficiency of its operation and its value to the nation as a whole.

In the hope that it may be of assistance to the Commission in its consideration of our argument regarding this specific subject, I feel it desirable to bring to your attention briefly certain characteristics unique to the Canadian National Railways.

Now, this railway, owned as it is by the government, occupies a special place in the national economy. It operates mileage of great magnitude, larger now than

that of any other railway in North America. It serves all the ten provinces of Canada, a large share of the responsibility for the development of Canada's national resources are borne by it, the thousands of miles in its operation mileage may well be called "pioneering lines". As has been said, it purchases commodities of a greater value and gives employment to more people than any other industrial undertaking in the country. The national welfare of Canada is closely connected with its own. It operates under tremendous financial handicaps and by reason of its history has greater special problems which have created corresponding financial burdens. By necessity obliged to operate pioneer lines, strategic lines and thin-traffic lines, its net earning power is greatly restricted, and in relation to this earning power, its fixed charges are grossly excessive. These burdens which it has borne since its inception in 1923, have through the years been aggravated by new lines of a similar nature which have been acquired or entrusted to it for operation.

In the further hope that it will be of assistance to the Commission in its deliberation on the very important subject of the recapitalization of Canadian National Railways, I wish to recall to the Commission very briefly and in a general way, the historical circumstances under which this system came into being.

The Commission will remember that during the first Great War, the Canadian Northern Railway and Grand Trunk Railway Company of Canada with its subsidiary, the Grand Trunk Pacific Railway Company, fell on evil days and that it became necessary for the Canadian Government to assume the burden of operating these privately-operated properties.

Financial difficulties of the predecessor railways resulted in the Drayton-Acworth Commission, which commission recommended the establishment of a

Dominion Railway Company to be owned by the crown and to be operated under the jurisdiction and authority of the Railway Commission as a commercial enterprise to conduct the operations of the bankrupt companies.

COMMISSIONER INNIS: Do you include the National Transcontinental in that set-up?

MR. O'DONNELL: Yes, I do, by reason of its having been entrusted after the incorporation of the Canadian National Company. You will remember, after the Canadian National Railways was incorporated the National Transcontinental and the Intercolonial were entrusted and made part of the system and have been operated ever since.

COMMISSIONER INNIS: Well, it was worked out in relation to the Grand Trunk Pacific in some sort of agreement?

MR. O'DONNELL: That is right.

COMMISSIONER INNIS: Now, is that included in the discussion of the Grand Trunk with you or is it separate?

MR. O'DONNELL: Well, the whole thing is interwoven and at the time the Canadian National Railway Company was incorporated the entire package of railways, so to speak, was turned over, the companies were transferred, the railway properties and the assets and liabilities of those various corporations. The whole enterprises or all those enterprises were turned over to the Canadian National Railway Company for operation and subsequently to the incorporation, as I stated, by P.C. 115, the National Transcontinental, the Intercolonial, the Lake Superior Branch leased from

the Grand Trunk Railway Company, the Prince Edward Island Railway, the Hudson's Bay Railway and all the rest were entrusted for management and operation.

THE CHAIRMAN: How far did the majority of those reports go?

MR. O'DONNELL: In what way?

THE CHAIRMAN: Respecting railways.

MR. O'DONNELL: Well, as you will remember, the Drayton-Acworth Commission went into the whole matter of these roads, the Canadian Northern, the Grand Trunk and the Grand Trunk Pacific, and it also went into the matter of the Canadian Pacific, and also discussed the National Transcontinental and the others, and in its recommendation for the review of the possibilities there were, faced as the Government was with these bankrupt roads and liable as the government was for their debts, the Drayton-Acworth commissioners -- and I intend to discuss that in some detail later --

THE CHAIRMAN: Those roads which you refer to as bankrupt roads are shown on the report, aren't they?

MR. O'DONNELL: Yes, they are mentioned and the Grand Trunk Pacific and the Canadian Northern in recommendation No. 23 of the Drayton-Acworth commissioners -- they are expressly referred to there and your lordship will remember that that recommendation is:

"We do not recommend that the Grand Trunk, the Grand Trunk Pacific and Canadian Northern Companies be allowed to go into the hands of a receiver."

They had previously reviewed their position and said: "Well, they are insolvent but we do not think you should let them go into the hands of the receiver." The reason for that was that the government being, so to

speak, guarantors, the report of the Drayton Commission said that they should not be allowed to go into bankruptcy and then we have Recommendation 27:

"Having come to the conclusion that direct ownership by the Government is to be avoided, and that ownership and operation by a commercial company is not possible, we recommend that a new public authority, a Board of Trustees incorporated by Act of Parliament as the 'Dominion Railway Company' and that the Canadian Northern, Grand Trunk and Grand Trunk Pacific be transferred to this body."

Then comes a recommendation of great importance:

"We recommend that the Government assume responsibility to the Dominion Railway Company for the interest on the existing securities of the transferred companies."

Now that, I contend --

THE CHAIRMAN: The Dominion Railway Company?

MR. O'DONNELL: When it was incorporated, instead of being given the name Dominion Railway Company it was called the Canadian National Railway Company.

That, briefly, is what the Drayton-Acworth Commission recommended at that time, and subsequent to that, as your lordship will remember, we have this Order in Council P.C. 115 entrusting those other government railways. That is on the 20th of January, 1923. We have the Intercolonial, the National Transcontinental, Lake Superior Branch leased from the Grand Trunk Pacific Railway Company, the Prince Edward Island Railway and the Hudson's Bay Railway. These were all entrusted so that the Canadian National --

THE CHAIRMAN: Were they all not entrusted by

the same Order in Council?

MR. O'DONNELL: No. All those I have mentioned are covered by Order in Council P.C. 115, 20th January, 1923, and I gave your lordship and members of the Commission copies of this some time ago.

Now, I had just stated that the Drayton-Acworth Commissioners recommended the establishment of the Dominion Railway Company to be owned by the crown and operated under the jurisdiction and authority of the Railway Commission as a commercial enterprise to conduct the operation of the bankrupt companies.

Then, I was going on to say that the incorporation of the Canadian National Railway Company was provided for in 1919 by the statute (9-10 Geo. V. Cap. 13) to perform the functions proposed by the Drayton-Acworth report. Upon the nomination of its Directors by Order in Council P.C. 2094, on October 4, 1922, the incorporation became effective, and Canadian National Railway Company duly constituted.

Your lordship and members of the Commission will note that the statute then while assented to in 1919 provided that it was only upon the nomination of its Directors by the Governor in Council that the incorporation of the Company would actually become effective. That is provided in Section 1.

THE CHAIRMAN: Was it the 1919 statute that gave you the name you have now, Mr. O'Donnell?

MR. O'DONNELL: Yes, Canadian National Railway Company was provided for by that, but Section 1 says:

"The Governor in Council may nominate such persons as may be deemed expedient, not less than five nor more than fifteen, to be directors

of the Company hereby incorporated, and upon such nomination being made the persons so nominated, and their successors, and such other persons as may from time to time be nominated by the Governor in Council as Directors, shall be and are hereby incorporated as a Company . . ."

It was rather a strange thing that the Act was passed in 1919, but it made provision for its becoming effective only upon the nomination by the Governor in Council of the Directors.

THE CHAIRMAN: Now the railways mentioned in that Act -- they are mentioned in that Act?

MR. O'DONNELL: Yes.

THE CHAIRMAN: They are all railways which otherwise would have been bankrupt and gone through the hands of a receiver?

MR. O'DONNELL: That is my understanding. It covered all those railways which at the time were constituent companies. Your lordship will remember I gave you a list here some days back of the various companies and I read into the record the companies that formed what I had referred to as the "core" of the Canadian National Railways and this gave you the subsidiary and constituent companies.

THE CHAIRMAN: What was referred to as the "core" is not necessarily restricted to those that are found in the statute of 1919?

MR. O'DONNELL: No, my lord. The statute of 1919 dealt with the Canadian Northern and the Railway Commission. They are all listed in this schedule.

THE CHAIRMAN: It dealt with all the railways that the Drayton-Acworth report said were bankrupt, that

is, by saying instead of going into the hands of a receiver they should be taken over by the Governmet?

MR. O'DONNELL: No, at this time it was dealing with the Canadian Northern subsidiaries and with the Grand Trunk arbitration award and all the procedure that went with that had been disposed of. The Grand Trunk became part of the system as well and subsequently the Government Railways were entrusted by this Order in Council P.C. 115.

THE CHAIRMAN: Were any railways put into the Canadian National Company that were not in a perilous position?

MR. O'DONNELL: Not at that time, my lord.

THE CHAIRMAN: They all were?

MR. O'DONNELL: Except the Canadian Government Railways which were not in trouble, but the others were all in trouble as the Drayton & Ackworth Commission Report shows. They were in bad shape.

THE CHAIRMAN: Well anyway they were all the subject matter of the dissentient Commissioner's report, who suggested that they be allowed to go into bankruptcy.

MR. O'DONNELL: Mr. Evans' suggestion is that the dissenting Commissioner, Mr. Smith, would have them go into bankruptcy. Now, I don't quite read it the same way, but I don't think it makes very much difference.

THE CHAIRMAN: He likewise treated them as being imminently bankrupt.

MR. O'DONNELL: He said there was no doubt about that, but he thought, as I should think, they should be allowed to work themselves up as best they could. He had a scheme of reorganization of his own. I don't intend to go into details of what was the dissenting thought. The Drayton and Ackworth Report was the one I concentrated on inasmuch as that is the one they acted on.

THE CHAIRMAN: But the 1919 statute provided that this Company should take over the same railways as were referred to in that report.

MR. O'DONNELL: Oh, yes, the Canadian Northern, and then it is mentioned, also, the Canadian Government Railways, but as we know Canadian Government Railways then, the Inter-colonial and Transcontinental, they were not in the same difficulty; but they were all turned over to this new company.

Subsequently when the Grand Trunk was acquired it in turn was transferred to the Canadian National, and subsequently again we have P.C. 115 turning over, under the entrusting power, all the government railways for management and operation as they were at that time.

Reference to the incorporation and to the Constitution of the Canadian National Company is contained at Volume 109, p. 20027.

In the beginning, as a result, Canadian National was a conglomeration of the three railway companies - Canadian Northern Railway Company, The Grand Trunk and Grand Trunk Pacific, to which were added by entrusting Order in Council, all of the Canadian Government Railways. That is the Order in Council I mentioned a moment ago, P.C. 115 of 20th of January, 1923.

It has been said on many occasions that the Canadian National was born in insolvency, and perhaps no one other phrase could more aptly describe the conditions which prevailed at the time of its birth.

THE CHAIRMAN: You accept that?

MR. O'DONNELL: Oh, I think without doubt, that that was the position, and I am quite prepared to say that the government only went into the railway position by reason of the fact that it had to save its own position as guarantor of the securities of these various companies.

If one looks through the Hansard reports, the discussion at the time the bill was going through the House, it will be seen that that was the situation. Sir Thomas White, who was then Acting Prime Minister, had this to say:

"Take the situation in Canada at the present time.

We have found that private ownership of railways, with the exception of the Canadian Pacific, has failed."

I have omitted some parts of the report and I am giving only

the pieces that give the sense of the statement.

"I stated the other day and I state now, that private ownership plus politics have brought about the situation with which we are confronted in this country. The Government of Canada, in order to save its own investments, represented by its guarantee and the guarantees of the Provinces of this Dominion, to safeguard the transportation interests, has been obliged to take over the railways they were administering today and will be obliged to take over practically all the other railways except Canadian Pacific".

I could find a number of other similar remarks, but I think it goes without saying that the position was that they were certainly in financial straits, very bad financial straits.

In the years immediately prior to amalgamation some of the constituent lines had very adverse operating ratios. The Canadian Northern, for instance - not including the Intercolonial or National Transcontinental - had for the twelve months ending May 31, 1920, an operating ratio of 117.61%, with an estimate that it would be in excess of 134% at the end of the year. That is in the 40% Case, 26 C.R.C. 130.

Now, with operating ratios such as that which had prevailed in, say, the five year period preceding amalgamation, there were operating deficits of nearly \$50 million - an actual annual average of \$9,692,615 for the five years 1918 - 1922. That is Exhibit 214, page 17. The deficits apart from the operating deficits, the deficits overall, including interest on the debt held by the public, was \$42,579,710 per year on the average for those five years. That is the position they were in at the time.

Now, it is most striking that so soon as they are amalgamated and put together and operated as a unified system, that the operating ratio dropped to 91.8%. That will be found in the report of the Duff Commission at page 50. Having taken these bankrupt roads and amalgamated them and unified them, that result was obtained in the first year.

As to the co-ordination of the previously competing companies into a consolidated system, the Duff Commission said this (and I read Section 32 of the Duff Report

"32. Following upon the consolidation of many lines into the Canadian National system in 1923, the railway has been energetically administered and has deservedly won approval by its success in welding together the various working forces of the separate companies in the consolidated system".

I say that all too frequently that fact is forgotten, and also that by many it is never even known, that in the years since amalgamation Canadian National Railways have never had an operating deficit.

That is something that many people do not understand, and that is one of the reasons why it considers that its annual financial reports and its operating results, its balance sheet, should be reviewed and adjusted so that the efficiency of the railway operations may be understood by the ordinary man in the street, without having to hire a chartered accountant to have him explain to him that these deficits are not operating deficits, but that they are an accumulation of the errors of the ages past, the errors at or prior to the turn of the century. That is what the deficits flow from and result from, and it is not the present day management and its operations that brings about

these deficits, that each year are advertised from one end of the country to the other as being a deficit which is not understood. That is one of the principal reasons for wanting to endeavour to get this matter adjusted, so that the railroad will be given a reasonable opportunity to make a fair showing, as it was intended, in my submission, it should, at the time, by the provisions of the Drayton-Acworth report.

The Commission will remember that the Drayton-Acworth Commissioners had never intended, in my view, that these interest charges should have been placed on the new company. That ^{is} what recommendation 28 says:

"We recommend that the government assume responsibility to the Dominion Railway Company for the interest on the existing securities of the transferred companies".

If that had been done - and they were \$35 million odd at that time on the \$804 million of interest bearing debt which was imposed on the new company - if they through the years had relief from that \$35 million a year, it would never show the deficits that have been recorded against it in the intervening years.

THE CHAIRMAN: Can you tell us why they decided to do that.

MR. O'DONNELL: Why this recommendation was made?

THE CHAIRMAN: No, why it was not carried out.

MR. O'DONNELL: On that aspect of it I don't know, but I am saying it should have been carried out, and I am saying that when the Drayton-Acworth Commissioners recommended that what would have happened in the ordinary course of dealing with privately operated companies, the putting of these companies through the Bankruptcy Court, when they recommended this should not be done in this particular case, but that these railways of which the government had endorsed

the securities; when they recommended that the one company should not be burdened with the interest, and that is the recommendation there and that recommendation was not carried out: I say that today, some twenty-three years later, it should be done, and that is one of the things that we are really asking for in this particular application.

Now, I have reviewed the situation of the railways as at the time, briefly, as at the time they were amalgamated.

III. CANADIAN NATIONAL RAILWAYS - TODAY

Now, since that time much has been done, and the Canadian National I say today is a very dominant force in the economy of Canada; and the transportation facilities which are provided by that System are a far cry from what they were in 1923 when there were these bankrupt roads that were struggling along with their deferred maintenance and no equipment and their roads in very bad shape; that the situation, as it stands today, is much better than it was then.

In that respect, your lordship and members of the Commission, you will remember that we have the Chief Commissioner of the Board of Transport Commissioners, and the Assistant Chief Commissioner, commenting on that fact, that since 1923 these roads have been fully integrated into one great railway transportation system, and that it is very well and efficiently operated and managed. I paraphrase the words which will be found in the 21st Judgment. Not only that, but our chief competitor, the Canadian Pacific, admits that that is the situation, that these roads are well managed and efficiently operated.

Now, the extent of the Canadian National operations, its plant and its equipment, we set out in some detail on pp. 7, 8 and 9 of the brief which was submitted. That is

Exhibit 214. I do not intend to take time to read those, but the extent of the operations of the Canadian National Railways today, I submit, is something that should be borne in mind when dealing with this problem.

We have heard a lot in the last few days of the operations and difficulties of another transportation agency; but in order to get the proper perspective of this thing I say that it is highly essential that we should appreciate the extent of the operations and the work that has been done by the Canadian National Railways today. Although not reading from the brief with all the details that may be found there in its pages, I would just like to ask the Commission to have this in mind, that today it operates in Canada alone in excess of 21,600 miles of first main track miles, or a system total for all tracks of 32,100 miles. The main track mileage operated in Canada exceeds by approximately 4,600 miles or 27% the mileage operated by the next largest railway in Canada. Compared on the basis of all operated mileage for all tracks in the system, it exceeds that of the other railways by 8,400 miles or 36%.

Now, as to its equipment, it has almost 2,600 more locomotives or 41% more than the next largest company, and it conducts operations with 105,000 odd freight cars and some 3,300 passenger cars or 38% and 23% respectively more than those operated by its chief competitor.

I am emphasizing this because I think the importance of this road should be realized and understood, and too few people know that.

Now, during the year 1948 (these figures are all 1948 which were included in the brief) 42% more tons of revenue freight were carried by the Canadian National than any other railroad in Canada, and 37% more freight revenues

were earned by it than its competitor. The 20 million more passengers which it carried exceeded by 47% those carried by the other railway. Now, I think it is high time that we understood exactly what the position of the Canadian National Railways in Canada is today.

THE CHAIRMAN: We will take that up tomorrow.

The Commission adjourned at 4.45 p.m. to meet again on Wednesday, May 24, 1950 at 10.30 a.m.

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